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NO.

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1986

GULF OIL CORPORATION

Petitioner

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Petitioner submits that its application for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit presents the following questions for review:

I. Whether the Louisiana Oilfield Indemnity Act can be permitted to apply to contracts on federal fixed platforms even though it attempts to preempt expressed federal law regulating the development and production of minerals on the OCS.
OCSLA, 43 U.S.C. §1331.

II. Whether a state may preempt statutory federal authority to regulate the development and production of minerals on the OCS. OCSLA, 43 U.S.C. §1331; LHWCA 33 U.S.C. 901, *et seq.*

III. Whether the Fifth Circuit's decisions below are inconsistent with its own decisions and other circuits and can ignore this Court's approval of expressed contractual indemnity in *United States v. Seckinger,* 397 U.S. 203, 90 S.Ct. 880 (1970), and as followed by the Third Circuit in *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands Corp.* 757 F.2d 1427 (3rd Cir. 1985).

IV. Whether a state may interfere with contracts and exceed its constitutional authority by restraining the rights of a targeted industry to contractually preapportion the risks of doing business by procurement of insurance.

V. Whether an insurer who receives premiums to insure a risk can be insulated from liability through an attempt to apply a state statute that invades the freedom of contract of private citizens on federal land.

## CERTIFICATE

The parties to the Fifth Circuit proceedings were Richard J. Doucet (hereinafter referred to as "Doucet"); Gulf Oil Corporation (hereinafter referred to as "Gulf"); Danos & Curole Marine Contractors, Inc. (hereinafter referred to as "D&C"); Gray & Company (hereinafter referred to as "Gray") and their attorneys. The Petition for Writ does not include any questions of law directly involving Richard Doucet. Since the inception of this case, Gulf has been acquired by Chevron, U.S.A., Inc. (hereinafter referred to as "Chevron").

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IN THE
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GULF OIL CORPORATION

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Respondents

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## PETITION FOR WRIT OF CERTIORARI

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## DECISIONS BELOW

The following decisions entered are as follows:

1. September 19, 1983 - Jury verdict in favor of Gulf dismissing claim of Doucet with Judgment entered on October 27, 1983. (Reversed by Fifth Circuit on February 20, 1986.)

2. May 16, 1984 - Opinion of district court in favor of Gulf on its third-party demand for contractual indemnity against D&C.

3. June 1, 1984 - Judgment entered in favor of Gulf against D&C.

4. June 20, 1984 - Minute Entry of district court reversing Opinion of May 16, 1984 and Judgment of June 1, 1984.

5 August 23, 1984 - Amended Judgment in favor of D&C dismissing the claim of Gulf.

6. February 20, 1986 - Opinion and Order of Fifth Circuit Court of Appeals affirming district court's Order dismissing the third-party demand against D&C. *Doucet v. Gulf Oil Corporation*, 783 F.2d 518 (5th Cir. 1986).

7. April 25, 1986 - Opinion and Order denying Gulf's Petition for Rehearing. *Doucet v. Gulf Oil Corporation, reh'g denied*, 788 F.2d 250 (5th Cir. 1986).

## JURISDICTION

Jurisdiction of the district court was predicated upon the Outer Continental Shelf Lands Act, 43 U.S.C. §1333. This Court has jurisdiction pursuant to 28 U.S.C. §1254 and is asked to review the decisions of the Fifth Circuit Court of Appeals filed on February 20, 1986 and April 25, 1986. *Doucet v. Gulf Oil Corporation*, 783 F.2d 518, *reh'g. denied*, 788 F.2d 250 (5th Cir 1986). 28 U.S.C. §2403(b) may be applicable to this proceeding.

## STATUTES INVOLVED

This petition raises issues concerning the following constitutional articles, amendments and statutes:

1. La.Rev.Stat. 9:2780 (West Supp. 1985) - Louisiana Oilfield Indemnity Act of 1981 (hereinafter referred to as "LOIA") reads in part:

   §2780. **Certain indemnification agreements invalid**

   A. The Legislature finds that an inequity is

foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the Legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to, or does provide for, defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of, or resulting from, death or bodily injury to persons, which is caused by, or results from, the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

2. U.S. Constitution, Fourteenth Amendment - Due Process and Equal Protection Clauses, Section 1.

**Section 1. Citizens of the United States.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberity, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. U.S. Constitution, Article 1, §10. Fourteenth Amendment of United States Constitution.

**Section 10, Clause 1. Powers denied states - Treaties - Money - Ex post facto laws - Obligations contracts.**

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of verdit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

4. OCSLA, 43 U.S.C. §1301, *et seq.* - Is produced in entirety in Appendix.

5. LHWCA, 33 U.S.C. §905(a) and (c).

(a) The liability of an employer prescribed in Section 4 [33 USCS §904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury of death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act. or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused

by the negligence of a fellow servent, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by Section 4 [33 USCS §904].

(c) In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under the Act by virtue of Section 4 of the Outer Continental Shelf Lands Act (43 U.S.C. §1333)[43 USCS §1333], then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of Subsection (b) of this Section. Nothing contained in Subsection (b) of this Section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this Act by virtue of Section 4 of the Outer Continental Shelf Lands Act (43 U.S.C. §1333)[43 USCS §1333] and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of, or resulting from, death or bodily injury to their employees. (As amended Sept. 28, 1984, P.L. 98-426, §§4(b), 5(a)(1), (b), 98 Stat. 1641.)

## STATEMENT OF THE CASE

On August 2, 1982, Doucet, a D&C employee working as an assistant pumper, received an injury in an accident while he was working on a Gulf fixed oil production platform, located in the Gulf of Mexico on a federal lease in the Outer Continental Shelf area. Doucet alleged that his

claims were maritime in nature and that jurisdiction was predicated upon the Outer Continental Shelf Lands Act, 43 U.S.C. §1333 *et seq.*

Gulf claimed against D&C for indemnity and/or contribution under a contract requiring D&C to indemnify Gulf and to procure insurance to defend and indemnify Gulf against all claims for personal injury, even though arising out of Gulf's own negligence. The parties admit that the contract requires D&C to defend and indemnify Gulf except if it is prohibited under LOIA.

On September 17, 1983, trial on the main demand was held and Judgment entered in favor of Gulf on October 27, 1983. Doucet appealed on November 11, 1983. The district court granted Gulf indemnity against D&C on May 16, 1984 and entered Judgment on June 1, 1984. On June 15, 1985, D&C appealed the Judgments entered on May 16, 1984, June 1, 1984 and October 27, 1983.

However, on June 20, 1984, the district court reversed its Judgment of June 1, 1984 and on August 23, 1984, entered Judgment in favor of D&C denying indemnity. D&C appealed again on October 4, 1984 and Gulf cross-appealed on August 23, 1984.

The Fifth Circuit affirmed the August 23, 1984 Judgment dismissing Gulf's claim for indemnity and also denied Gulf's rehearing with written reasons on April 25, 1986.

Gulf is filing for writs on the substantial issues involving this "*State versus Federal*" conflict. Gulf shows that Congress, by enacting the Outer Continental Shelf Lands Act, prohibited any legislation by Louisiana attempting to control or regulate the development of minerals on this federal enclave. LOIA is inconsistent with federal law as enunciated in *United States v. Seckinger,* 397 U.S. 203,

90 S.Ct. 880 (1970) and is in conflict with previous Fifth Circuit decisions in *Smith v. United States,* 497 F.2d 500 (5th Cir. 1974) and with the Third Circuit's holding in *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands Corp.,* 757 F.2d 1427 (3rd Cir. 1985). LOIA also conflicts with provisions of the Longshoremen's & Harbor Worker's Compensation Act, which permits this type of indemnity contract. *Lockheed Aircraft Corp. v. United States,* 103 S.Ct. 1033 (1983).

LOIA is unconstitutional in that it is inapposite to the Contract Clause, Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

Gulf submits that contractual indemnity provisions which relate to oil operations on the Outer Continental Shelf is legally permissible where the intent of the parties is clearly expressed.

## ARGUMENT

### *I. THE APPLICATION OF LOIA TO CONTRACTS ON FIXED FEDERAL PLATFORMS PREEMPTS EXPRESSED FEDERAL LAW REGULATING THE DEVELOPMENT AND PRODUCTION OF RESOURCES ON THE OCS.*

Jurisdiction of the district court was predicated upon the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1331. The Outer Continental Shelf (OCS) encompasses all submerged lands lying seaward of the adjacent state's marine boundaries, 43 U.S.C. §1301. It is undisputed that the law applicable to fixed platforms on the OCS is "federal law." Accordingly, LOIA *could only be adopted as surrogate federal law if it:* (1) *applied and* (2) *was not*

*inconsistent with the OCSLA, federal law or statutes. Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969), 43 U.S.C. §1333(a)(2)(A).

LOIA represents an attempt by a state to regulate relationships involved in the development and production of minerals on the OCS contrary to the purpose and intent of the OCS, 43 U.S.C. §1301 *et seq.*[1] LOIA became effective on September 11, 1981 and attempts to nullify and void as "against public policy of the State of Louisiana" any and all contract provisions which seeks to indemnify and hold harmless a party against liability for personal injury.[2] The scope and application of LOIA is silent as to whether it was intended to affect the development or production of the seabed on the OCS, which is owned and leased by the Federal Government to private corporations for development and exploration. However, an inconsistency is noted in that even within the state of Louisiana, LOIA specifically does not apply to private owners or usufructuaries of a surface estate.

OCSLA extends the political power and laws of the United States to the subsoil and seabeds of the OCS and to the artificial islands thereon for the purpose of exploring for, developing, and producing subsurface resources. 43 U.S.C. §1333(a)(1). The term "production" encompasses the activities which take place after the successful completion of a well for the transfer of minerals to shore. 43 U.S.C. §1331(m).

The legislative history of the OCSLA reveals that OCSLA was passed in 1953 in response to a Congressional belief that the Federal Government lacked legal authority to lease out various sections of the OCS for resource

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[1] Text of the OCSLA is reproduced in the Appendix.

[2] Text of LOIA is reproduced in part on Page (19) of this writ.

development. H.R. No. 413, 83d Cong., 1st Sess., reprinted in 1953, U.S. Code Cong. & Ad. News 2177, 2178.

Congress, by enacting OCSLA, intended to assert exclusive federal control over the subsoil of the OCS and to provide for development of its vast resources. S.Rep. No. 411, 83d Cong., 1st Sess. 2 (1953). Decisions by this Court recognize that the Federal Government alone has *sovereignty* and *ownership* in the seabed and subsoil of the OCS to the exclusion of adjacent states. *See, United States v. Texas,* 339 U.S. 707, 70 S.Ct. 918 (1950); *United States v. Louisiana,* 339 U.S. 699, 70 S.Ct. 914 (1950), *reh'g. denied,* 340 U.S. 856, 71 S.Ct. 75 (1950); *United States v. California,* 332 U.S. 19, 67 S.Ct. 1658 (1947), *reh'g. denied,* 787, 68 S.Ct. 37 (1947); *Maryland v. Louisiana,* 451 U.S. 725, 101 S.Ct. 2114 (1981).

In essence, OCSLA vests the Federal Government with a proprietary interest in the OCS and establishes a regulatory scheme governing leasing and operations. 43 U.S.C. §1334 addresses the administration of leasing property on the OCS and prescribes the rules and regulations necessary thereto. 43 U.S.C. §1337 grants authority to the Secretary of the Interior to grant leases. 43 U.S.C. §1347 and §1348 directs the United States Coast Guard and federal agencies to develop safety and health regulations and to enforce those regulations on the OCS.

In 1978, amendments to OCSLA were adopted principally to achieve regulatory ends. Congress amended OCSLA to update government control of resource development on the OCS and to ensure the promulgation of the dual policy of resource production and environmental protection.

The Conference Committee on the 1978 Amendments to OCSLA reiterated that "federal law is to be

applicable to all activities on all devices in contact with the seabed for exploration, development and production." Conference Report No. 1474, 95th Cong., 2d Sess. 80, reprinted in 1978, U.S. Code Cong. & Ad. News 1450, 1679. LOIA is an atempt by a state to regulate the drilling and production by private companies in partnership with the United States to develop the OCS.

43 U.S.C. §1333(a)(1) clearly recognizes that the OCS is to be treated "as if it were an area of exclusive federal jurisdiction located within a state." Congress chose to retain exclusive federal control of the administration of the Shelf because it was on the high seas and the assertion of sovereignty there implicated the foreign policies of the nation. S.Rep. No. 411, 83d Cong., 1st Sess. 6 (1953). Section 1333 makes it clear that the adoption of state law as federal law could never be the basis for a state to participate in the administration, production or development of an area outside of state boundaries. S.Rep. No. 411, 83d Cong., 1st Sess. 23 (1953). OCSLA provides a federal framework for the granting of leases for exploration and production of minerals from the submerged lands on the Shelf. 43 U.S.C. §1334 and §1343.

LOIA is not applicable to OCS because it attempts to participate in the administration, production, and development of an area outside of state boundaries and jurisdiction. S. Rep. No. 411, 83d Cong., 1st Sess. 23 (1953).

LOIA frustrates the goal of uniformity in the development of the shelf and effectively illustrates how bordering states might infringe and pass statutes which effectively control a zone that has been declared by Congress to be exclusively federal. 43 U.S.C. §1301 *et seq.* By legislatively imposing restrictions on contracts to develop the OCS, the Louisiana Legislature is directly controlling and regulating the development of the OCS and, if permitted, could lead to further restrictions by states.

## *II. THE LOIA CONFLICTS WITH EXISTING FEDERAL LAW.*

*LOIA is inconsistent* and conflicts with existing federal law and should not be permitted to affect the indemnity provisions in the contract between Gulf and D&C. This Court has twice considered the applicability of federal law versus state law under the provisions of OCSLA. In *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969), this Court decided the law applicable to plaintiff's tort remedy in a fixed platform wrongful death action. In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971), this Court decided the applicable statue of limitations for a tort action on a fixed platform. This Court has not previously addressed the law to be utilized in interpreting a contract for work to be performed on the OCS. This Court stated in *Huson* that:

> "To the extent that a comprehensive body of federal law is applicable under §1333(a)(1), state law 'inconsistent' with that law would be inapplicable under Section 1333(a)(2)." 404 U.S. 101, 92 S.Ct. 352.

This Court has never suggested in either *Rodrigue* or *Huson* that the term "applicable federal laws" is limited only to the OCSLA, federal statutes, or regulations of the Secretary. To the contrary, this Court in *Huson* specifically refers to the term "applicable federal laws" as embracing a comprehensive body of federal common law. Moreover, the Opinion notes that a federal court adjudicating a claim under the Lands Act does not function as it would in a diversity case under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), *reh'g. denied*, 305 U.S. 673, 59 S.Ct. 229 (1938) and thus recognizes the difference. 404 U.S. n. 5 at 102.

Everyone accepts the proposition that there exists a need for authority in certain areas to formulate what has come to be known as "federal common law." *See, Clearfield Trust Co. v. U.S.*, 318 U.S. 744, 63 S.Ct. 573 (1943); *United States v. Standard Oil Co., 332 U.S. 301, 67 S.Ct. 1604 (1947); Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 101 S.Ct. 2061 (1981). This is especially true where a federal rule or decision is necessary to protect uniquely federal interests and when Congress has conferred to the courts the power to develop substantive law.

Clearly, federal common law exists to furnish answers when the rights and obligations of the United States may need to be determined and interstate disputes, conflicting state's rights and maritime law problems exist. It cannot be seriously disputed that there is in existence today a comprehensive body of federal law concerning indemnity, wherein an indemnitee may recover indemnity for his own negligence by express contract. *United States v. Seckinger,* 397 U.S. 203, 90 S.Ct. 880 (1970).

In *Seckinger,* this Court formulated "federal law" in interpreting a contract and permitted indemnity.

> "Preliminarily, we agree with the Court of Appeals that federal law controls the interpretation of the contract...
>
> In fashioning a federal rule, we are, of course, guided by the general principles that have evolved concerning the interpretation of contractual provisions, such as that involved here. Among these principles is the general maxim that a contract should be construed most strongly against the drafter..." 397 U.S. 209, 90 S.Ct. 884.

In *United States v. Seckinger,* this Court recognized federal law on indemnity and the Fifth Circuit followed *Seckinger* in *Smith v. United States,* 497 F.2d 500 (5th Cir. 1984), holding:

> "We begin our analysis with the Supreme Court's treatment of a similar, through not identical, contractual situation in *United States v. Seckinger,* 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed. 224 (1970). We observe initially that here, as there, the interpretation of the contract is controlled by federal law, ..." 497 F.2d 507.

Also in *Corbitt v. Diamond M Drilling Co.,* 654 F.2d 329 (5th Cir. 1981), the Fifth Circuit followed *Seckinger,* holding that an indemnity provision would not afford protection to an indemnitee against the consequences of his own negligent acts, unless the contract clearly expressed such an obligation. Federal law, as enunciated in *Seckinger,* was similary followed, adopted and recognized by the Fifth Circuit in *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge,* 424 F.2d 684 (5th Cir. 1970).

## UNIFORMITY - IS THERE A NEED?

In addition, federal courts have recognized overriding federal interests in applying federal law because of the need for uniformity and consistency. In *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 402, 90 S.Ct. 172 (1970) and *Kermarec v. Compagne General Transatlantic,* 358 U.S. 625, 79 S.Ct. 406 (1959), this Court clearly held that state law, even through it does not contravene an established principle of admiralty law, will, nevertheless, not be applied where its adoption would impair the uniformity and simplicity of the federal admiralty law.

All courts applying federal common law principles have consistently held that contract provisions mandating

indemnity for torts arising out of either party's negligence or concurrent negligence are valid and not against public policy. *Mont Boat Rentals v. Union Oil Co.*, 613 F.2d 576 (5th Cir. 1980); *Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge*, 424 F.2d 684 (5th Cir. 1970); and *Batson Cook Co. v. Industrial Steel Erectors*, 257 F.2d 410 (5th Cir. 1958).

The Louisiana Legislature has stated that a motivating purpose for enacting the LOIA was to promote safety. However, the OCSLA evidences a congressional need for uniformity and an understanding that work on fixed offshore platforms has federal concerns. Even though the OCSLA did not generally apply admiralty law to fixed platforms on the OCS, it also did not leave the law of worker safety to the states.

First, it explicitly provided for LHWCA coverage of OCS fixed platform workers. 43 U.S.C. §1333(b). In particular, Congress chose to vest authority for general safety regulation of fixed or floating platforms on the OCS in the Coast Guard, "the agency traditionally charged with regulation and enforcement of maritime matters." See 43 U.S.C. §1333(d). In accordance with that authorization, the Coast Guard promptly promulgated a code of safety regulations that reflected the existence of some of the same sort of hazards on these rigs as one would associate with "National" environments. See 21 Fed.Reg. 900 (1956). Thus Congress and their federally designated agency have recognized that the offshore locality of platform workers' work affects their working conditions and requires uniformity.

Federal common law of indemnity has evolved in numerous maritime claims. An indemnity clause in a maritime contract is interpreted according to *federal law* rather than *state law.* The federal law has uniformly permitted indemnity where the words requiring indemnification are clear and precise. *Corbitt v. Diamond M Drilling Co.,* 645 F.2d 329 (5th Cir. 1981); *Mont Boat Rentals v. Union Oil Co., supra; Roberts v. William-McWilliams,* 48 F.2d 255(5th Cir.1981). Further, the provisions of an indemnity contract requiring a party to fully insure their obligations and to obtain a waiver of subrogation have never been declared invalid, unenforceable or contrary to public policy. *Twenty Grand Offshore v. West Indian Carriers,* 492 F.2d 679 (5th Cir. 1974). The purpose of insurance procurement provisions are to initially allocate the burden of procuring insurance.

Since there exists a comprehensive body of federal law on the subject of contractual indemnity permitting an indemnitee's recovery for his own negligence, LOIA is *inconsistent* and cannot be applied under the OCSLA.

## *A. THE FIFTH CIRCUIT'S DECISIONS BELOW CONFLICT WITH DECISIONS IN OTHER CIRCUITS*

The federal rule of law enunciated by this Court in *Seckinger* is not limited to its facts but applies with equal force to contracts between private citizens. In *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands Corp.,* 757 F.2d 1427 (3d Cir. 1985), a worker at the Hess Oil Refinery sued Beloit Power Systems Company for damages arising out of a personal injury suffered while installing an electrical control panel built by Beloit. Beloit brought an action against the worker's employer for contractual indemnity. The Third Circuit Court of Appeals interpreted the indemnity contract between these private parties according to federal

law and allowed Beloit to be indemnified from Hess. The Court stated:

> "In *United States v. Seckinger,* the Court stated, applying federal law, 'We specifically decline to hold that a clause that is intended to encompass indemnification for the indemnitee's negligence...must explicitly state that indemnification extends to injuries occasioned by the indemnitee's negligence.'
>
> The law now permits the indemnitee to recover for its own negligence if the Court is firmly convinced that such an interpretation reflects the intent of the parties. *United States v. Seckinger,* 397 U.S. 211, 90 S.Ct. 885." 757 F.2d 1431

Recently, the Third Circuit Court of Appeals reaffirmed its interpretation and application of *Seckinger* in *Eastern Airlines v. Insurance Company of North America,* 758 F.2d 132 (3d Cir. 1985), wherein the Court held:

> "On the other hand, this Court has already concluded that there is no public policy that prevents judicial enforcement of the parties' agreement to shift the cost of, or liability for, the consequences of one's own negligence, provided it is done clearly and unambiguously. *Beloit I,* 757 F.2d 1430. *See also, United States v. Seckinger,* 397 U.S. 203, 211 (1970)." At page 135.

Confusion exists not only within the Fifth Circuit, but between the Fifth Circuit and the Third Circuit in interpreting this Court's holding in *United States v. Seckinger, supra,* which warrants a review by this Court.

## *B. LOIA IS INCONSISTENT WITH THE LHWCA AS INCORPORATED IN THE OCSLA*

OCSLA contemplates that the OCS is to be treated as if it were an area of exclusive federal jurisdiction. In this regard, OCSLA incorporated the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* to cover the "disability or death of an employee resulting from an injury" arising from exploration or production activities on the Shelf. 43 U.S.C. 81333(c). State workmen's compensation laws do not provide a remedy for workers on the OCS. *Herb's Welding, Inc. v. Gray, 105 S.Ct. 1421 (1985).*

This Court has recognized that Gulf is entitled to contractual indemnity from an LHWCA employer, such as D&C, pursuant to 33 U.S.C. §905(a). *Lockheed Aircraft Corp. v. United States,* 490 U.S. 190, 103 S.Ct. 1033 (1983)(Interpreting FECA counterpart analogus to §905 (a) of LHWCA.) *See also, Horton v. Sun Exploration & Production Company,* 616 F.Supp. 130 (W.D. La. 1985) (applying *Lockheed* rationale to LHWCA).

Even §905(b) does not prohibit D&C from procuring insurance naming Gulf as an additional assured. Congress enacted §905(b) to eliminate the shipowner's liability to longshoremen for unseaworthiness and the stevedores' liability to a shipowner for unworkmanlike service. It did not suggest that additional assured clauses were proscribed. In *Voisin v. ODECO,* 744 F.2d 1174 (5th Cir. 1984), the Fifth Circuit affirmed that while contractual indemnity is barred by §905(b), the insurance obligation to name and waive is not barred.

## GULF PAID FOR D&C'S INSURANCE

D&C's agreement to provide insurance with Gulf named as an additional assured is in keeping with the meaning and intent of the LHWCA. Further, the economic burden of the premiums was covered in the rates charged by D&C to Gulf for the work performed. An agreement as to which party should bear the burden of procuring insurance is not an illegal contract of indemnity under §905(b). *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980). Here, the beneficiary of the lower court's decision is not D&C but D&C's insurer who has been already paid to cover Gulf but is not required to do so by the decision.

The September 28, 1984 Amendments to the LHWCA added Subsection 905(c) to permit reciprocal contractual indemnity between a vessel owner and an employer, whose employees were engaged in work on the OCS and who were covered by LHWCA by virtue of the OCSLA. Nothing in the LHWCA prohibits contractual indemnity between employers and non-vessels. The Joint Explanatory Statement of the Committee of Conference that recommended Section 905(c) provides:

> Finally, the Senate bill provides an exemption to the Longshore Act's current proscription of indemnity agreements under Section 5(b) of the Act. That section is made applicable currently to situations on the OCS by virtue of Section 4 of the OCSLA (43 U.S.C §1333). The bill would legalize those indemnity agreements as they apply to the OCS *and would further preempt the application of state laws prohibiting such indemnity agreements.* [Emphasis added.]

LHWCA Amendments of 1984, P.L. 98-426, 98 Stat. 1639, House Conference Report 98-1027, Joint Explanatory Statement of the Committee of Conference, 130 Cong. Rec. H9598 (September 14, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, at 2773. Judging from this legislative history, Congress did not feel that it was necessary to expressly validate indemnity agreements between vessels and employers in order to preempt the application of state law; it was only necessary to remove the prohibition of same in section 905(b). By analogy, it is not necessary for Congress to specifically approve contractual indemnity agreements between employers and non-vessels in order to preempt application of state law. It is sufficient that nothing in the LHWCA prohibits contractual indemnity between employers and non-vessels.

Thus, in addition to this Court's holding in *United States v. Seckinger, supra*, there also exists federal statutory authority which permits contractual indemnity as demanded by Gulf. LOIA is clearly inconsistent with federal laws and should not be permitted to deny the indemnity claim of Gulf here.

## *III. LOIA CONSTITUTES AN IMPERMISSIBLE USE OF A STATE'S POLICE POWER AND IS THEREFORE VOID ON ITS FACE UNDER THE CONTRACT CLAUSE, THE DUE PROCESS CLAUSE, AND THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION*

### *CONTRACT CLAUSE*

It is undisputed that the situs of the accident and performance of the contract was a fixed production platform located on the OCS on a federal lease. OCSLA was intended as a vehicle to enact a leasing policy for the purpose

of encouraging the discovery and development of the oil potential of the OCS. By analogy, the state of Louisiana could not enact a statue affecting the contractual rights of private citizens drilling for minerals in Mississippi or Texas.

Article 1, Section 10 of the United States Constitution reads in pertinent part:

> "No state shall...pass any...law impairing the obligations of contracts..."

The Contract Clause limits the power of a state to regulate contractual obligations between private parties. Essentially, the Contract Clause prohibits those state laws which substantially impair or nullify clearly defined, vested rights arising under private contract. *United States Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 97 S.Ct. 1505 (1977), *reh'g. denied*, 431 U.S. 975, 97 S.Ct. 2942 (1977). This is especially true where a state attempts to regulate contracts for operations beyond a state's boundaries and jurisdiction. There is no legitimate and/or rational basis to extend the police power of any state to the OCS.

LOIA impairs the contractual rights of Gulf and other companies in the development and production of offshore lands because it substantially invalidates, releases and extinguishes the obligations of a contract and derogates substantial contractual rights. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398,54 S.Ct. 231 (1934).

## WHAT NEXT-OFFSHORE?

Could Louisiana next pass legislation that OCS workers must have Louisiana work permits or that all lease operators must pay the State a royalty on the minerals produced from the platform?

Obviously not!! And, for the same reason, this Court must also prohibit the state from seeking to intervene in the agreements to pre-apportion responsibilities on federal fixed platforms.

LOIA, which purports to strike down as against "Louisiana" public policy all indemnity contracts, waivers of subrogation, additional named insured endorsements and any other forms of insurance protection, is a flagrant violation of the Contract Clause and unreasonably and arbitrarily exceeds the scope of the state's police power. Impairing contractual rights of the parties who relied on the federal laws and federal public policy as they existed when the contract was entered destroys the ability to contract.

LOIA attempts to extend the state's police power where the Federal Government has already preempted the field and asserted its own jurisdiction and regulations with respect to development and production.

This Court in *Allied Structural Steel v. Spannaus,* 438 U.S. 234, 98 S.Ct. 2716 (1978), *reh'g. denied,* 439 U.S. 886, 99 S.Ct. 233 (1978) indicated that where an act disrupts contract rights of private individuals as substantially and permanently as does LOIA, the Act must pass close constitutional scrutiny under the Contract Clause.

## DUE PROCESS CLAUSE

The Due Process Clause protects the substantive interests of citizens. LOIA is unconstitutional and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution as it does the Contract Clause. *Spannaus, supra* (Dissenting opinion); *Veix v. Sixth Ward Building & Loan Assoc.,* 310 U.S. 32, 60 S.Ct. 792 (1940); *Home Building & Loan Assoc. v. Blaisdell, supra;*

*Exxon Corp. v. Eagerton*, 462 U.S. 174, 103 S.Ct. 2296 (1983); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S.Ct. 697 (1983).

LOIA substantially and severely destroys contractual rights in an area where the Federal Government has both vested proprietory interest and exclusive jurisdiction. There is no national or rational purpose which can be advanced to justify such a substantial impairment by a state where the Federal Government has statutorily exercised control over the regulation of a given area.

## EQUAL PROTECTION CLAUSE

Louisiana has attempted to impose on the OCS what a passing legislature perceives as economic equal protection by demanding that oil developers assume completely the costs of insurance. The statute threatens the freedom of the Federal Government to formulate economic and regulatory policies on the OCS. The equal protection doctrine is the constitutional limit that constrains such acts of state legislatures.

LOIA is clearly unconstitutional on its face under the provisions of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the Legislature has unreasonably and without justification singled out the mineral industry working in Louisiana.

Further, Gulf submits that Louisiana's attempt to control, regulate and destroy contractual relationships between private parties on the OCS could seriously affect the development of an area leased by the United States and, as such, is an illegitimate attempt to exercise police powers.

Indemnity agreements are regularly used by all

segments of Louisiana industries. Yet, LOIA expressly applies only to the Louisiana mineral industry. Such distinction is arbitrary, unreasonable and unrelated to any conceivable purpose for which the LOIA might have been passed.

Other states have entered this field, but not as restrictive as Louisiana.[3] An example is Texas, which has an anti-indemnity statute,...V.A.T.S. Article 2212(b). There is a significant difference between the Texas and Louisiana statutes. The Texas statute permits the parties to procure insurance to cover the rights and obligations normally covered by the indemnity contract. V.A.T.S., Article 2212(b) (4).

Master Service Contracts entered into by oil companies often involve work off the coast of various states on federally leased land. The application of differing indemnity statutes to the OCS would arbitrarily subject one master contract to arbitrary interpretations predicted on situs. The varying public policy of each adjacent state fosters unequal protection to preapportionment of risks and should not be tolerated

## CONCLUSION

The OCS is an area of exclusive federal jurisdiction and strong national interests are prevalent. By applying LOIA to contracts on the OCS, the Fifth Circuit is permitting a state to, in essence, tell the Federal Government what contracts should be enforced on the OCS. This infringes on the Federal Government's regulation of the OCS and its exercise of jurisdiction over the Shelf. 43 U.S.C. §1331 (a) (3).

---

[3] Mississippi has an indemnity statute concerning hold harmless clauses in construction contracts. Miss. Code, Ann. §31-5-41 (Supp. 1978).

LOIA is an unconstitutional attempt to regulate and control contracts for the development of the OCS. LOIA is not only contrary and inapposite to the intent of the OCS, but also the Contract, Due Process and Equal Protection Clauses of the U.S. Constitution.

LOIA is inconsistent with federal common law and federal law and defeats uniformity. There is confusion within the Fifth Circuit and conflict between the Fifth Circuit and the Third Circuit in the interpretation of this Court's holding in *United States v. Seckinger,* 397 U.S. 203, 90 S.Ct. 880 (1970). A Writ of Certiorari on the questsions presented for review should be issued to the Court of Appeals for the Fifth Circuit and its decisions reversed.

Respectfully submitted,

ROBERT B. ACOMB, JR.
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(504) 582-8000
Attorneys for Petitioner
Gulf Oil Corporation

## CERTIFICATE

I hereby certify that a copy of the above and foregoing has been mailed by U.S. Mail to all counsel of record, and to the Attorney General for the State of Louisiana this 19 day of July 1986. New Orleans, Louisiana.

ROBERT B. ACOMB, JR.
GRADY S. HURLEY

## APPENDIX A

MINUTE ENTRY
BEER,J.
MAY 16, 1984

FILED
May 17, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RICHARD JOSEPH DOUCET — CIVIL ACTION

VERSUS — NUMBER 82-4818

GULF OIL CORPORATION — SECTION M

This Outer Continental Shelf Lands Act case came to trial on September 8, 1983. The jury returned a verdict that plaintiff, Richard Doucet, was a "borrowed employee" of defendant, Gulf Oil Corporation, and thus entitled to compensation only, rather than damages. The jury accordingly did not address the questions of defendant's negligence or strict liability. The remaining claim which must be dealt with here is brought by Gulf Oil Corporation against Danos & Curole and seeks attorneys' fees. Gulf relies upon an indemnification agreement contained in the contract between the parties.

The contract provides for indemnification for:

> "claims,...and against all costs, expenses, and attorneys' fees incurred by Gulf in the defense of such causes of action...or account of personal injuries or death or damage to property, whether arising out of negligence on the part of Gulf or otherwise...or upon any theory of strict liability...arising out of the work performed by the contractor hereunder...."

DATE OF ENTRY - MAY 17, 1984

But Danos & Curole contends that the provision is unenforceable, by reason of Louisiana Revised Statute 9:2780 (B):

> "Any provision...affecting an agreement pertaining to a well for oil...is unenforceable to the extent that it... does provide for defense or indemnity...against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee...."

In *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969), the Court framed the relationship of state law to federal law under the Outer Continental Shelf Lands Act as subordinate. State law applies "only when not inconsistent with applicable federal law...." 89 S.Ct. at 1837.

Under federal law, a corporation may recover indemnity for its own negligence if the applicable contract expressly so provides. *See generally, U. S. v. Seckinger,* 399 U.S. 203, 90 S.Ct. 880, 886 n. 17 (1970). Should this principal of federal law be treated as "applicable law" within the meaning of *Rodrique, supra?*

Danos and Curole contends that there is no federal common law, but it is more correctly stated that "there is no federal *general* common law," *Erie Railroad Co.,v. Tomkins,* 304 U.S. at 78, 84 L.Ed., at 1194, (emphasis supplied).

It appearing that federal decisions recognize the enforceability of a clear agreement to indemnify, application of Louisiana Revised Statute 9:2780 would be inconsistent.

Counsel for Gulf is directed to submit a judgment consistent herewith in the stipulated amount.

/s/ PETER BEER

COUNSEL OF RECORD

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED - May 31, 1984

| | |
|---|---|
| RICHARD JOSEPH DOUCET | CIVIL ACTION |
| VERSUS | NO. 82-4818 |
| GULF OIL CORPORATION | Section "M" (2) |

### JUDGMENT ON THIRD-PARTY DEMAND

This action under the Outer Continental Shelf Land Act came to trial on September 8, 1983. The third-party demand filed by Gulf Oil Corporation against Danos & Curole Marine Contractors, Inc. for indemnity and attorney fees was taken under consideration and the Court rendered its memorandum opinion on legal issues therein on May 17, 1984. Considering the ruling and the stipulation of the parties as to the litigation expense incurred by Defendant Gulf Oil Corporation,

IT IS ORDERED, ADJUDGED AND DECREED that Gulf Oil Corporation recover $27,500.00, plus interest from Danos & Curole Marine Contractors, Inc.
This 1st day of June, 1984.

/s/ Peter Beer
UNITED STATES DISTRICT JUDGE

Date of Entry JUN 1 1984

## APPENDIX C

MINUTE ENTRY
BEER, J.
JUNE 20, 1984

Filed
JUN 20, 2984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| RICHARD JOSEPH DOUCET | CIVIL ACTION |
| VERSUS | NUMBER 82-4818 |
| GULF OIL CORPORATION | SECTION M |

On reflection, I have concluded that my minute entry of May 16, 1984, is in error.

Accordingly, on my own motion and after reconsideration, I recall that minute entry.

I believe that the results of that minute entry of May 16, 1984, are in conflict with Judge Robert Collins' opinion in *Bryant v. Platform Well Service, Inc.*, 563 F. Supp. 760 (E.D. La. 1983). Since it was not my intention to take issue with that opinion, either tangentially or directly, I recall my ruling (and the judgment based thereon). Should it be determined that this action conflicts with Rule 60, et seq. of the Federal Rules of Civil Procedure, then I stand ready to take such action as may be acceptable to all parties to clarify the issue.

/s/ Peter Beer

COUNSEL OF RECORD
DATE OF ENTRY JUN 20 1984

## APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
Aug 23, 1984

| | | |
|---|---|---|
| RICHARD JOSEPH DOUCET | * | CIVIL ACTION |
| VERSUS | * | NUMBER |
| GULF OIL CORPORATION | * | 82-4818 |
| | * | SECTION M(2) |

* * * * * * * * * * *

### JUDGMENT

This action came on for trial on October 17, 1983 before the court and a jury. Considering the verdict of the jury on special interrogatories, the judgment dismissing plaintiff's claims against Gulf Oil Corporation previously entered and the court's minute entries dated May 16, 1984, June 20, 1984 and August 16, 1984;

IT IS ORDERED, ADJUDGED AND DECREED that the third party complaint of Gulf Oil Corporation against Danos & Curole Marine Contractors, Inc. be dismissed, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the counterclaim by Danos & Curole Marine Contractors, Inc. against Gulf Oil Corporation and the cross-claim by Danos & Curole Marine Contractors, Inc. against Richard Joseph Doucet be dismissed.

New Orleans, Louisiana, this 22nd. day of August, 1984.

/s/ PETER BEER
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY - Aug 23, 1984

## APPENDIX E

# UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD JOSEPH DOUCET,
*Plaintiff-Appellant,*

v.

GULF OIL CORPORATION,
*Defendant-Appellee.*

No. 83-3711

RICHARD JOSEPH DOUCET,
*Plaintiff,*

v.

GULF OIL CORPORATION,
*Defendant-Third Party Plaintiff-Appellee,*

v.

DANOS & CUROLE MARINE CONTRACTORS, INC.,
*Third Party Defendant-Appellant.*

No. 84-3434

RICHARD JOSEPH DOUCET,
*Plaintiff-Appellee,*

v.

GULF OIL CORPORATION,
*Defendant-Third Party Plaintiff-Appellee Cross-Appellant,*

v.

DANOS & CUROLE MARINE CONTRACTORS, INC.,
*Third Party Defendant-Appellant Cross-Appellee.*

No. 84-3612
OPINION

Filed February 20, 1986

Before: Alvin B. Rubin and Thomas M. Reavley, Circuit Judges, and Frank J. Polozola*, District Judge.

Opinion by Judge Alvin B. Rubin

Appeals from the United States District Court
for the Eastern District of Louisiana
Peter H. Beer, District Judge, Presiding

## SUMMARY

**Labor/Torts/Civil Procedure**

Appeal from judgment. Reversed and remanded in part and affirmed in part.

*District Judge of the Middle District of Louisiana, sitting by designation.

A roustabout, Doucet, nominally employed by a contractor, sued the oil company, Gulf Oil Corp., for whom the contractor had agreed to provide labor services on theories of negligence and strict liability for injuries allegedly received while working on Gulf's offshore platform. Gulf brought a third-party claim against the contractor for indemnification and the costs of defense. The contractor counterclaimed for recoupment of compensation paid Doucet. In its jury charge, the trial court instructed that if the jury decided Doucet was the borrowed employee of Gulf, he would be paid compensation by Gulf. The contract between Gulf and the contractor required the contractor to indemnify Gulf against all costs, expenses and fees incurred by Gulf on account of personal injuries arising out of the contractor's work.

**[1]** The Fifth Circuit has consistently held that if an oil company assumes so much control over the activities of a person who is nominally the employee of the company's subcontractor as to make that person in effect a borrowed employee, the company is shielded by the exclusivity of the compensation remedy from tort liability. This stems from a reverse application of the respondent superior doctrine. **[2]** The 1984 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) did not abolish this defense by implication.

**[3]** Doucet's failure to object to either the trial court's initial reference to compensation or the reference by opposing counsel did not waive his right to object to the jury charge. **[4]** The jury charge regarding Doucet's compensation under the LHWCA from Gulf was erroneous in that it interjected improper considerations into the jury's deliberations and it was factually incorrect. **[5]** Doucet's objection to the jury instruction was timely even though it was made after the jury retired because it was made as soon as the court gave counsel an opportunity to object. Based on the erroneous instructions, the verdict in favor of Gulf is reversed and Doucet's claims are remanded for trial.

**[6]** If the Louisiana Oilfield Indemnity Act (the Act) is applicable Gulf would not be entitled to reimbursement for its costs of defense because the act declares null and void any provision in any agreement which requires defense in a lawsuit premised on negligence or strict liability of the indemnittee. **[7]** If the Act is applicable to this

accident occurring on the outer continental shelf, it is by virtue of the Outer Continental Shelf Lands Act which adopts state law as surrogate federal law for the shelf to the extent state law is not inconsistent with federal law. **[8]** The LHWCA has been held to be the complete source of rights of workers injured on fixed platforms on the outer continental shelf. **[9]** The LHWCA neither expressly permits or forbids contractual indemnity between nonvessels and compensation paying employers. This gap is to be filled by state law. **[10]** The Act, adopted in 1981 after Gulf's contract was executed, applies to blanket contracts such as this one which covers any kind of work performed in the future. **[11]** The argument that the Act is unconstitutional because it denies Gulf equal protection is without merit. **[12]** The district court had jurisdiction to withdraw its granting of Gulf's third-party demand for indemnity, because the judgment was not final at that point. An incidental action—the counterclaim for recoupment by the contractor—was still pending. Therefore, the order dismissing the third-party demands against the contractor is affirmed.

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## OPINION

ALVIN B. RUBIN, Circuit Judge:

A roustabout nominally employed by a contractor sued the oil company for whom the contractor had agreed to provide labor services on theories of negligence and strict liability for injuries allegedly received while working on the oil company's offshore production platform. The jury found that the oil company was the employer of the roustabout because it had borrowed his services, and, hence, was shielded from tort liability. Ruling on third-party demands for indemnification and costs of defense, the district court dismissed the oil company's claim against the contractor and the contractor's counterclaim for recoupment of compensation paid the roustabout.

We hold that an oil company subject to the Longshoremen's and Harbor Workers' Compensation Act may invoke the borrowed-employee doctrine in defense of a tort claim by a worker nominally employed by a labor-services contractor. Because, however, the

trial court told the jury that, if it decided that the injured worker was the borrowed employee of the defendant oil company, he would be paid worker's compensation by the oil company, we reverse the judgment entered on a jury verdict for the defendant and grant a new trial.

Considering the third-party demands, we hold that the contract between the oil company and the labor-services contractor is subject to the Louisiana Oilfield Indemnity Act, and, therefore, is void to the extent that it requires the contractor to indemnify the oil company and defend it against claims attributable to the oil company's own negligence. Because under the law of this circuit the determination whether a defense is due must be made at the outset of litigation by reference solely to the allegations of the pleadings and the contractual provisions, and the roustabout's complaint alleged that the oil company was itself negligent and strictly liable, we affirm the dismissal of the oil company's third-party compliant.

I.

Gulf Oil Corporation engaged Danos & Curole Marine Contractors in 1980 to furnish it with general oil field labor and to provide other services. The contract gave Danos & Curole authority to control and direct the performance of details of the work. Danos & Curole employed Richard Joseph Doucet as a roustabout, an oil field laborer. After Doucet had worked on other jobs, Danos & Curole assigned him to work as a roustabout/assistant pumper on offshore platforms in a Gulf Oil field. Doucet testified that he worked under the supervision of Bryan Utech, the Danos & Curole field supervisor, but, when neither Utech nor the other Danos & Curole supervisor was present, he took orders from the Gulf employee who was working as a pumper on the same platform. After working on this assignment for a month, Doucet was injured. He received compensation benefits from Danos & Curole's insurer under the Longshoremen's and Harbor Workers' Compensation Act.[1]

Doucet then sued Gulf for maritime tort. Gulf defended by argu-

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[1]33 U.S.C.A. §§ 901-950 (West 1986).

ing that Doucet was its borrowed employee and that his exclusive remedy against Gulf was, therefore, compensation under the Act.[2]

Some of the evidence pointed to Danos & Curole as Doucet's real and not merely nominal employer. Danos & Curole determined when its employee's would receive wage increases. It fixed each employee's work schedule. Danos & Curole employees did not attend Gulf safety meetings. Danos & Curole provided all of Doucet's personal equipment. Gulf had not trained Doucet. There was, however, contradictory evidence that: Doucet worked directly under the supervision of the Gulf operator/pumper; his work schedule was set by Gulf and Gulf certified the amount of wages due him; Gulf retained authority to discharge him from the platform if Doucet failed to comply with instructions from the Gulf supervisor; Gulf was required to approve any increase in his salary; Gulf provided transportation offshore; and Gulf supplied the tools and materials necessary to do his job as a pumper's helper.

During that part of the jury charge explaining the borrowed-employee rule, the court twice referred to Gulf's possible liability to Doucet for compensation benefits. First it told the jury:

> Thus, to sustain its contention, Gulf Oil must show, by a preponderance of the evidence, that Doucet was its borrowed employee. If it is able to sustain that showing, then Gulf's liability is limited to compensation under the Longshoremen's and Harbor Workers' Compensation Act, because in that case Mr. Doucet [sic] exclusive remedy is under that Act and as you all have heard from the testimony that has been adduced, has been paid and continues to be paid.

The court also instructed the jury:

> If you find that Mr. Doucet was, indeed, the borrowed employee of Gulf, you need not continue your deliberations, for Mr. Doucet would then receive compensation under the Longshoremen and Harborworkers Act from Gulf as provided by federal statute.

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[2] *Id.* at § 905(a).

It later stated:

> It is possible, under the law, to be an employee of both Gulf and Danos & Curole. In other words, based on your evaluation of the facts, you could find that both Gulf and Danos & Curole had assumed the responsibility of an employer toward Doucet at the time of his alleged injury .... I am merely telling you that you do not have to choose between Gulf and Danos & Curole as Doucet's employer.

Immediately after completing the charge, the judge instructed the jury to retire and begin deliberating. Before doing so, he did not ask if counsel had any objections to the instructions, nor did counsel for any party intervene to request an opportunity to object. However, as soon as the jury retired the judge solicited counsels' objections to the charge. Counsel for Doucet objected both to the court's charge that an employee may simultaneously have several employers and to its instruction that Gulf would pay Doucet compensation if the jury found Doucet to be Gulf's borrowed employee.

In response to a special interrogatory, the jury found that Doucet was Gulf's borrowed employee. On this appeal, Doucet contends that, under the Compensation Act as amended in 1984, the borrowed-employee doctrine is no longer a defense to a tort claim. He also reasserts the objections made in the trial court to the jury charge, adding an additional alleged error: the trial court's failure to instruct the jury that Gulf had a duty to comply with section 932 of the Compensation Act by securing workmen's compensation insurance for Doucet if it sought litigious immunity.

The contract between Gulf and Danos & Curole required Danos & Curole to indemnify Gulf "against all costs, expenses, and attorney's fees incurred by Gulf in the defense of . . . causes of action . . . on account of personal injuries . . . whether arising out of negligence on the part of Gulf or otherwise, including . . . any theory of strict liability, . . . arising out of the work performed by [Danos & Curole] hereunder. . . ." When Doucet sued, Gulf demanded that Danos & Curole defend the suit. Danos & Curole refused to defend, prompting Gulf to file its third-party complaint. After initially

granting Gulf's demand for contractual indemnity, the district court reversed itself and dismissed the third-party complaint. The court also denied Danos & Curole's counterclaim against Gulf for reimbursement of the compensation it had paid Doucet.

II.

Doucet first argues that the borrowed-servant doctrine is contrary to the 1984 amendments to the Compensation Act and to the statute's underlying policy, and, hence, should not be applied so as to shield a general contractor such as Gulf from liability in tort. The Act makes every employer liable for compensation regardless of fault.[3] It also provides that this liability "shall be exclusive and in place of all other liability of" the employer to the employee.[4] As rewritten by the recent amendments, section 904(a) of the Act provides that a "contractor," such as Gulf, who employs a "subcontractor," such as Danos & Curole, is liable for compensation "only if such subcontractor fails to secure the payment of compensation." The amendments also added the following sentence to section 905(a):

> For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payments of compensation as required by section 904 of this title.

Thus, Doucet argues, Gulf could have become Doucet's employer, responsible for compensation and shielded from tort liability, only if Doucet's nominal employer, Danos & Curole, had failed (as it did not) to secure compensation.

[1] This circuit has consistently held that, if an oil company assumes so much control over the activities of a person who is nominally the employee of the company's subcontractor as to make that person in effect its borrowed employee, the company is shielded by the exclusivity of the compensation remedy from tort liability.[5]

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[3] 33 U.S.C.A. §§ 904(a), (b) (West 1986).

[4] *Id.* at § 905(a).

[5] *Hebron v. Union Oil Co. of Cal.*, 634 F.2d 245 (5th Cir. 1981); *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978); *Ruiz v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969).

This was not based on a specific provision of the Compensation Act but stemmed from a reverse application of the *respondeat superior* rule, the rule that an employer is responsible not only for the acts of those persons on his payroll but for the acts of those over whom he has such control that they are in effect his borrowed servants.[6] Thus a rule designed to impose tort liability on a person in control of an employee, albeit a borrowed one, became a defense against tort liability to the controlled employee.

[2] The 1984 amendments did not abolish this defense by implication. Congress' purpose in amending the Act was to overrule the Supreme Court's decision in *Washington Metropolitan Area Transit Authority v. Johnson.*[7] For reasons we have recently fully dicussed in *West v. Kerr-McGee Corp.*, we held:

> The legislative history of the 1984 amendments unambiguously demonstrates that Congress's *sole* purpose in amending § 904(a) and § 905(a) was to overrule *WMATA*, and not to amend the borrowed-servant doctrine or otherwise modify LHWCA law.[8]

If the question were open, we might agree with Judge Tate's concurring opinion in *West*:

> It makes no functional sense to hold that a contractor, immune under the Act from compensation remedy for injuries received by a subcontractor's employees, is nevertheless also entitled to tort immunity because of the exclusive nature of the compensation remedy accorded, not at all against the contractor, but solely against the subcontractor.[9]

But circuit authority culminating in *West* fixes the law of the circuit.

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[6] *Gaudet*, 562 F.2d at 355-57.

[7] 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984) (*WMATA*).

[8] 765 F.2d 526, 530 (5th Cir. 1985) (emphasis added).

[9] *Id.* at 533 (Tate, J., concurring).

III.

**[3]** We turn to the court's jury instructions. Doucet contends that the court improperly informed the jury that, if it found Gulf to be Doucet's borrowed employer, Gulf would pay him compensation pursuant to the Act. At the outset we note that even an argument by counsel that the plaintiff in a tort suit will receive worker's compensation is so prejudicial as to warrant a new trial, if the objection is properly made, because it may adversely affect the jury's deliberations on status[10] or violate the collateral source rule.[11] In this case, the court first mentioned the fact that Doucet was receiving compensation benefits from Danos & Curole's insurer when instructing the jury about the issues in the case at the start of the trial. Each party thereafter referred to his receiving compensation. Doucet did not object either to the court's initial reference to compensation or to the reference by opposing counsel. Nonetheless, his failure to object at that time did not waive his right to do so as to the court's jury charge if erroneous.

**[4]** The court's instruction was erroneous for two reasons: as stated above, it interjected improper considerations into the jury deliberations, and it was factually incorrect. Doucet was already receiving compensation from Danos & Curole's insurer. Therefore, section 904(a)[12] of the Compensation Act shielded Gulf from liability for compensation. As Judge Tate recently stated in his concurrence in *West v. Kerr-McGee Corp.*:[13] "[S]ince the subcontractor . . . *did* secure the payment of the [Compensation] Act's benefits to its injured employees, the contractor . . . , the present defendant, is not liable for compensation benefits."

**[5]** Doucet is not estopped to raise this error on appeal by his failure to object before the jury retired. Although Federal Rule of Civil

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[10] *See, e.g. Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed.2d 4 (1963).

[11] *Bourque v. Diamond M. Drilling Co.*, 623 F.2d 351 (5th Cir. 1980).

[12] 33 U.S.C.A. § 904(a) (West 1986) provides in part: "In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation."

[13] 765 F.2d 526, 533 (5th Cir. 1985) (Tate, J., concurring).

Procedure 51 requires a party who wishes to preserve error to object before the jury retires, it also provides: "Opportunity shall be given to make the objection out of the hearing of the jury." The rule's purpose is to prevent unnecessary retrials by forcing parties to bring their objections to the attention of the judge in time that he may have an opportunity to correct his charge if he is in error.[14] Doucet voiced his objection to the charge at the time the court called for objections, after it had instructed the jury. The district court should not have allowed the jury to retire to its deliberations before giving counsel the opportunity to object. As Professor Wright and Miller observe, "There can be no final retirement of the jury until opportunity has been afforded for making objections. If the jury is excused to afford an opportunity to object, it should be admonished not to begin deliberating until further advised by the court."[15] Having allowed the jury to deliberate, the court made no effort to correct its error by recalling the jury and giving it further instructions. We conclude that the court's instruction was erroneous and that, under the circumstances, Doucet's objection was timely because it was made as soon as the court gave counsel a chance to object. We, therefore, reverse the verdict in favor of Gulf and remand Doucet's claims for trial.

Doucet also contends that the court improperly instructed the jury that he could simultaneously be the employee of both Gulf and Danos & Curole. He argues that, when the borrowed-servant doctrine is invoked either as a means of imposing liability on an employer responsible for the acts of his borrowed employee, or as a means of shielding an employer from tort liability as argued in this case, the employee's relationship with his nominal employer must temporarily terminate.[16] In view of the fact that the verdict must be set aside on other grounds, we need not decide whether this observation was correct or whether, if not, it was prejudicial.

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[14] *Ebanks v. Southern Ry. Co.*, 640 F.2d 675, 679 n.6 (5th Cir. 1981); *Wallace v. Ener*, 521 F.2d 215 (5th Cir. 1975).

[15] 9 C. Wright & A. Miller, Federal Practice and Procedure § 2553, at 634 (1971) (citations omitted).

[16] *Standard Oil Co. v. Anderson*, 212 U.S. 215, 224, 29 S.Ct. 252, 255, 53 L.Ed. 480, ___ (1909); *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 313 (5th Cir. 1969); *Kiff v. Travelers Ins. Co.*, 402 F.2d 129, 132 (5th Cir. 1968). *Contra Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Oilfield Safety, Etc. v. Harman Unlimited*, 625 F.2d 1248 (5th Cir. 1980).

Doucet also objects to the district court's failure to instruct the jury that Gulf must comply with section 932 of the Compensation Act by securing workmen's compensation insurance to be shielded from tort liability. Doucet did not make this objection at trial and is foreclosed by Federal Rule of Civil Procedure 51 from raising it now.[17] Moreover, given our conclusion that the borrowed-servant doctrine survives the 1984 amendments to the Compensation Act, the proposed instruction would have been improper.

IV.

The Louisiana Oilfield Indemnity Act.[18] adopted in 1981, invalidates a provision in an indemnity contract only "to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee. . . ." The master service contract between Gulf and Danos & Curole provides that Danos & Curole will defend and indemnify Gulf from all claims asserted by Danos & Curole personnel, regardless of Gulf's negligence or fault. Hence, the contract would be invalidated by the Louisiana Act, if at all, only to the extent that it permits Gulf to seek indemnity against "loss" or liability for bodily injury "caused by" or "arising out of" the negligence or fault of Gulf.

[6] If the Act is applicable, however, Gulf would not be entitled to reimbursement for its costs of defense even if, on remand, it should successfully defeat Doucet's claims. In two recent cases we have held that under Louisiana law the determination whether a defense is owed turns on the allegations of the complaint.[19] In this case, Doucet's pleading alleged that Gulf was liable under theories

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[17] *See Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1142 (5th Cir. 1985); *Rojas v. Richardson*, 703 F.2d 186 (5th Cir.), *reh'g granted*, 713 F.2d 116 (5th Cir. 1983); *Jenkins v. General Motors Corp.*, 446 F.2d 377 (5th Cir. 1971), *cert. denied*, 405 U.S. 922, 92 S.Ct. 959, 30 L.Ed.2d 793 (1972).

[18] Oilfield Indemnity Act of 1981, Acts 1981, No. 427, codified at La. R.S. § 9:2780 (West Supp. 1985).

[19] *Knapp v. Chevron U.S.A., Inc.*, No. 84-3399, slip op. at 8-11, 18-20 (5th Cir. 1986); *Sullen v. Missouri Pacific RR. Co.*, 750 F.2d 428 (5th Cir. 1985).

of negligence and strict liability. The anti-indemnity act declares "null and void . . . any provision in any agreement which requires defense" in a lawsuit premised on the negligence or strict liability of the indemnitee.

Danos & Curole contends that the Louisiana Act is applicable to contracts on the outer continental shelf and renders this defend-indemnify provision invalid. Gulf in turn contends that: (1) the Louisiana Act does not apply to operations on the outer continental shelf undertaken pursuant to a federal lease; (2) if the statute is applicable, it is inconsistent with federal law and thereby fails to satisfy the requisite of the Outer Continental Shelf Lands Act;[20] (3) if applicable and not inconsistent, the statute cannot be applied retroactively so as to affect the contract between Gulf and Danos & Curole which was entered into before the effective date of the legislation; (4) the Louisiana Act is unconstitutional; and (5) the district court was without jurisdiction to withdraw its original decision once Danos & Curole docketed its appeal from the judgment in the circuit court.

A.

[7] Gulf contends that the Louisiana Act was not intended to apply extra-territorially and therefore does not apply to this accident which occurred on the outer continental shelf. The Louisiana statute is silent on whether it was intended to apply offshore. Its lack of specificity is not decisive even if purposeful. If the statute is applicable, it becomes so not by virtue of Louisiana's intention that it reach contracts for offshore work, but by virtue of the Outer Continental Shelf Lands Act, which adopts state law as surrogate federal law for the shelf to the extent state law is "applicable and not inconsistent with this subchapter or with other Federal laws and regulations."[21] The Louisiana Act was intended to govern the type of indemnity contract relating to the work for which Gulf retained Danos & Curole.[22] Unless it is made inapplicable for those reasons specified in the federal Shelf Lands Act, the Louisiana Act, by vir-

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[20] 43 U.S.C. § 1333(a)(2)(A) (1982).

[21] *Id.*

[22] *See supra* text following note 18.

tue of the federal Act, applies to contracts for services on the outer continental shelf[23] and controls the Gulf-Danos & Curole contract.

B.

[8] The Shelf Lands Act provides that employees injured on the outer continental shelf "shall be [entitled to benefits] payable under the provisions of the Longshoremen's and Harbor Worker's Compensation Act."[24] We have held that the Compensation Act is the complete source of rights of workers injured on fixed platforms on the outer continental shelf against their employers.[25] Section 905(b) of the Compensation Act proscribes indemnity contracts between vessels and employers; section 905(c) removes section 905(b)'s proscription to the extent that indemnity agreements between vessels and employers are reciprocal.

[9] Gulf argues, therefore, that the exclusivity of the Compensation Act and its failure to address the type of indemnity agreement involved in this case, make the Act inconsistent with the Louisiana Act. This argument has just been rejected by this court in *Knapp v. Chevron USA, Inc.*[26] The Compensation Act neither expressly permits nor forbids contractual indemnity agreements between nonvessels and compensation-paying employers. This silence is a gap in federal law that, according to the Shelf Lands Act, is to be "filled" by state law governing such indemnity contracts.[27]

The Louisiana Act does not conflict with federal common law. Gulf's reliance on the Supreme Court's decision in *United States v. Seckinger*[28] as creating such a conflict is misplaced. *Seckinger* held that an indemnity clause in a contract between the federal govern-

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[23] *See Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969); *Knapp v. Chevron USA, Inc.*, No. 84-3399 (5th Cir. 1986).

[24] 43 U.S.C. § 1333(b) (1982).

[25] *Nations v. Morris*, 483 F.2d 577, 588 (5th Cir.), *cert. denied*, 414 U.S. 1071, 94 S.Ct. 584, 38 L.Ed.2d 477 (1973).

[26] No. 84-3399, slip op. at 16-18 (5th Cir. 1986).

[27] *See Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

[28] 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970).

ment and a contractor required the contractor "to indemnify the United States to the full extent that its negligence, if any, contributed to the injuries to the employee,"[29] when the contractor and the government were joint tortfeasors. The Court imposed this joint liability on the basis of comparative negligence, rejecting the government's position that it was entitled to indemnification for damages resulting from the government's own negligence. The Court, therefore, interpreted the contract consistently with our application of the Oilfield Indemnity Act not to embrace liability for the indemnitee's negligence.

C.

Gulf's next line of defense is that the Oilfield Indemnity Act cannot be applied retroactively so as to partially invalidate a contract executed before the enactment of the anti-indemnity statute.

**[10]** The contract between Gulf and Danos & Curole is labelled a "blanket contract." It covers "any kind of work [that Danos & Curole] may be requested to perform from time to time for Gulf . . . from May 16, 1980 to May 16, 1982, and as long thereafter as necessity for same continues . . . ." When the Louisiana legislature adopted the anti-indemnity statute in 1981, it provided that the Act, by its terms, did not apply to a contract executed before the effective date of the Act *if* the contract governed a "specific terminable performance of a job or activity."[30] The Act, however, does apply to "agreements . . . which are designed to provide indemnity to the indemnitee for all work performed between the indemnitor and the indemnitee in the future. *This specifically includes what is commonly referred to in the oil industry as master or general service agreements or blanket contracts in whatever form and by whatever name.*"[31] The statute exempts only contracts governing "a specific terminable performance of a specific job or activity" that were executed before the effective date of the statute. The Gulf-Danos & Curole contract is not of that kind and, hence, is not exempted by the statute.

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[29] *Id.* at 215, 90 S.Ct. at 887, 25 L.Ed.2d at ___

[30] La. R. S. § 9:2780(I) (West Supp. 1985).

[31] *Id.* (emphasis added).

D

[11] The next bastion in Gulf's Maginot Line is the alleged unconstitutionality of the Louisiana Act on the ground that it denies Gulf the equal protection of the laws and violates the contract clause of both the United States and the Louisiana state constitution. As we fully explained in *Knapp*,[32] this contention is without merit.

E.

[12] Gulf lastly argues that the district court was without jurisdiction to withdraw its order granting Gulf's third-party demand for indemnity. Federal Rule of Civil Procedure 54(b) resolves this issue. It states: "the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating *all* the claims and the liabilities of *all* the parties." (Emphasis added.) The original order was *not* a final judgment because an incidental action—Danos & Curole's counterclaim for recoupment of compensation benefits it had paid Doucet—was still pending. Because the judgment was not final, it was nonappealable,[33] and the attempted notice of appeal from that order did not divest the district court of jurisdiction to withdraw or modify the order. The revised order was a final judgment and the appeal from it cured the defects in the premature appeal.[34]

V.

We also reverse the district court's order dismissing Danos & Curole's counterclaim against Gulf. Although Danos & Curole's workmen's compensation policy did not contain a waiver of subrogation in favor of Gulf, section G of the Oilfield Indemnity Act[35] deprives the waiver of effect.

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[32]Slip op. at 14-16.

[33]28 U.S.C. § 1291 (1982).

[34]*Jetco Elec. Ind. v. Gardiner*, 473 F.2d 1228, 1231 (5th Cir. 1973).

[35]La. R.S. § 9:2780(G) (West Supp. 1985).

## VI.

For the reasons set out above, we REVERSE the judgment in favor of Gulf on the claims of Doucet and Danos & Curole, and we REMAND such claims for trial. We AFFIRM the district court's order dismissing Gulf's third-party demands against Danos & Curole.

# UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

| | |
|---|---|
| RICHARD JOSEPH DOUCET,<br>*Plaintiff-Appellant,*<br>v.<br>GULF OIL CORPORATION,<br>*Defendant-Appellee.* | No. 83-3711 |
| RICHARD JOSEPH DOUCET,<br>*Plaintiff,*<br>v.<br>GULF OIL CORPORATION,<br>*Defendant-Third Party Plaintiff-Appellee,*<br>v.<br>DANOS & CUROLE MARINE CONTRACTORS, INC.,<br>*Third Party Defendant-Appellant,* | No. 84-3434 |

RICHARD JOSEPH DOUCET,
*Plaintiff-Appellee,*

v.

GULF OIL CORPORATION,
*Defendant-Third Party Plaintiff-Appellee Cross-Appellant,*

v.

DANOS & CUROLE MARINE CONTRACTORS, INC.,
*Third Party Defendant-Appellant Cross-Appellee.*

No. 84-3612

OPINION

Filed April 25, 1986

Before: Alvin B. Rubin and Thomas M. Reavley, Circuit Judges, and Frank J. Polozola*, District Judge.

Per Curiam

Appeals from the United States District Court
for the Eastern District of Louisiana
Peter H. Beer, District Judge, Presiding

**ON PETITION FOR REHEARING**
(Opinion February 20, 1986, 5th Cir. 1986, __ F.2d __)

*District Judge of the Middle District of Louisiana, sitting by designation.

## SUMMARY

### Conflict of Laws/Contracts/Civil Procedure

Petition for rehearing. Denied.

Gulf Oil Company contends that *United States v. Seckinger,* 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970) adopts the rule that federal common law controls both the validity and interpretation of indemnity clauses in contracts for work on the outer continental shelf.

**[1]** *Seckinger* held that federal law controlled the interpretation of a contract between the federal government and a contractor in a suit brought under the Federal Tort Claims Act. **[2]** The decision did not involve the outer continental shelf nor did it purport to fashion a general federal common-law rule on contractual indemnity. **[3]** *Matte v. Zapata Offshore Co.,* slip op. at 4028, held that the Louisiana Act was not in conflict with federal law, stating "... Congress intended that the law of the adjacent state would become surrogate federal law on fixed platforms on the Shelf, to the exclusion of rules of admiralty and *common law.... Seckinger*'s holding and rationale would not displace the law of Louisiana as the 'law of the United States' on the Shelf adjoining Louisiana."

**[4]** Gulf also contends that a new trial should not be required because it was Doucet's counsel who mentioned compensation during his direct examination of Doucet. However, according to the record, the court first mentioned compensation when instructing the jury at the start of the trial. Neither Doucet's counsel's failure to object at that point nor his subsequent reference to compensation precluded his later objection to the jury charge, which he made when the court solicited objections to the charge.

## OPINION

PER CURIAM:

All of the parties agree that Louisiana's Oilfield Indemnity Act[1] cannot be applied if it is inconsistent with the Outer Continental Shelf Lands Act[2] or "other Federal laws and regulations of the Secretary" of the Interior.[3] In its application for rehearing, Gulf Oil Company contends that the decision of the Supreme Court in *United States v. Seckinger*[4] adopts the rule that federal common law controls both the validity and interpretation of indemnity clauses in contracts for work on the outer continental shelf. We do not so interpret *Seckinger.*

[1] In *Seckinger,* the Court held that federal law controlled the interpretation of a contract between the federal government and a plumbing contractor in a suit brought under the Federal Tort Claims Act.[5] The Court naturally, indeed inevitably, applied federal law to interpret "the meaning of the words of a clause in a government contract."[6] "This conclusion," the Court said, "results from the fact that the contract was entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution."[7]

[2] In *Smith v. United States,*[8] we followed *Seckinger* and held federal common law applicable to the interpretation of an indemnity agreement in a government contract for the construction of a levee. Neither decision involves the outer continental shelf and neither purports to fashion a general federal common-law rule on contractual indemnity.

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[1]La. R.S. 9:2780 (West Supp. 1985).

[2]43 U.S.C.A. §§ 1331-1356 (West 1986).

[3]*Id.* at § 1333(a)(2)(A).

[4]397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970).

[5]28 U.S.C. §§ 2671-2680 (1982).

[6]*Seckinger,* 397 U.S. at 219, 90 S.Ct. at 889, 25 L.Ed.2d at ___ (Stewart, J., dissenting).

[7]*Id.* at 209-10, 90 S.Ct. at 884, 25 L.Ed.2d at ___

[8]497 F.2d 500 (5th Cir. 1974).

Prior to our decision in this case, another panel of this court had held that the Louisiana Oilfield Indemnity Act applies to private contracts for work relating to the development of natural resources on the outer continental shelf,[9] as two district courts had already held.[10] In *Knapp v. Chevron USA, Inc.*,[11] we concluded that the Louisiana Act is not in conflict with the Longshore and Harbor Workers Compensation Act.[12]

[3] Following our decision in this case, another panel considered whether the Louisiana Act conflicts with federal common law. In *Matte v. Zapata Offshore Co.*,[13] that panel held that the Louisiana Act is not in conflict with federal law relying, in part, on our decision in this case but adding:

> As the Supreme Court made abundantly clear in *Rodrigue*, Congress intended that the law of the adjacent state would become surrogate federal law on fixed platforms on the Shelf, to the exclusion of rules of admiralty and *common law*. Even if *Seckinger* accurately reflected the federal common law applicable in an instance as is here presented, a proposition we do not accept, *Seckinger*'s holding and rationale would not displace the law of Louisiana as 'the law of the United States' on the Shelf adjoining Louisiana.[14]

This conclusion conflicts with nothing in *Seckinger* or *Smith*.

[4] Gulf also contends that a new trial should not be required because it was Doucet's counsel who mentioned compensation during his direct examination of Doucet. Whether this resulted from some agreement between the parties that compensation might be mentioned we cannot determine, for neither the pretrial order nor the record mentions any such agreement. What is not in the pretrial

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[9] *Knapp v. Chevron, USA, Inc.*, 781 F.2d 1123 (5th Cir. 1986).

[10] *Frazier v. Columbia Gas Dev. Corp.*, 596 F. Supp. 429 (W.D. La. 1984); *Bryant v. Platform Well Serv., Inc.*, 563 F. Supp. 760 (E.D. La. 1983).

[11] 781 F.2d 1123 (5th Cir. 1986).

[12] *Id.* at 1130-31.

[13] No. 85-3067 (5th Cir. March 10, 1986).

[14] *Matte*, slip op. at 4028.

order or on the record we have no way to know and are forbidden to consider. We can only review the record, and we do not take evidence to supplement or contradict it. The record shows that the trial court first mentioned compensation when instructing the jury at the start of the trial. Although Doucet's counsel did not then object, neither his failure to do so nor his subsequent reference to compensation, as we stated in the opinion, precluded his later objecting to the jury charge, if it was erroneous. When the court solicited objections to the charge, Doucet promptly objected.

Even if an explanation of Doucet's receipt of compensation were by this time permissible,[15] the instruction did not merely mention compensation; it made a factually incorrect statement. It stated that Gulf, the defendant, would be liable for compensation if the jury found Doucet to be Gulf's borrowed employee. It thus created the inference that Gulf would in some manner compensate Doucet regardless of the jury's findings on the borrowed employee issue. The record shows, however, that compensation was being paid by Danos & Curole's insurer, not by Gulf or its insurer. Of course, Doucet's counsel would have done better to object to any mention of compensation when the trial began. Nevertheless, his failure to do so did not waive his right to object to a later and incorrect reference in the court's instruction to the jury.

For these reasons, the application for rehearing is DENIED.

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[15] *See contra Simmons v. Hoegh Lines*, No. 84-3791, slip op. at 4237-38 (5th Cir. March 14, 1986).

## APPENDIX F

BLANKET CONTRACT
GULF 95177 - D (SHEET1)

CITY- Houma
STATE- Louisiana
DATE- 5-16-80
CONTRACT NO.- 03-1059

Gentlemen:

This is to confirm our understanding with you concerning any kind of work you may be requested to perform from time to time for Gulf Oil Corporation, acting by and through Gulf Oil Exploration and Production Company, a Division of Gulf Oil Corporation, hereinafter called "Gulf", as an independent contractor in the State of *Louisiana*, from *May 16, 1980* to *May 16, 1982*, and as long thereafter as necessity for same continues; it being understood and agreed that either party may cancel this contract by giving the other party ten (10) days written notice of such cancellation, but neither party hereto shall by the termination of this agreement be relieved of its or his respective liabilities arising from or incident to work performed hereunder prior to the time such contract is terminated.

1. **DESCRIPTION OF WORK:**

The types of work contemplated to be done by you are *to furnish general oilfield labor, equipment, and boats, inshore and offshore*

_____

_____

and such other work as is generally performed by you in your usual line of service. The jobs to be performed will be as requested by an authorized representative of Gulf and directed to you as "Contractor".

2. **BEGIN WORK:**

Contractor agrees to begin each particular job covered by this contract at such time as is agreed upon between Contractor and Gulf's representative.

3. **DELIVERY TICKETS:**

Delivery Tickets covering any material or supplies furnished by or chargeable to Gulf at any job performed hereunder shall be turned in to the Gulf office each day with Contractor's work ticket. The quantity, description, and condition of materials and supplies so furnished shall be checked by Contractor or Contractor's representative, and the tickets shall be properly certified by Contractor or by Contractor's representative.

4. **PRICE SCHEDULES:**

Gulf will pay Contractor for jobs performed or services rendered hereunder in accordance with schedule of prices attached hereto and made a part of this contract. It is understood that the rates and prices set forth in the attached schedule of prices are subject to change by either party upon ten (10) days written notice to the other party. The rates to be paid to Contractor by Gulf for the actual performance of the work shall be in lieu of any charges for materials or supplies furnished by Contractor for use in the work and any charges for transportation of tools, equipment and labor or time required to transport tools, equipment and labor to and from the job, unless otherwise specified in the schedule of prices.

5. **FOREMAN, LABOR, EQUIPMENT, SUPPLIES, AND SERVICES:**

Contractor shall at Contractor's expense furnish

foreman, labor, equipment, machniery, tools, materials, and supplies necessary for the performance of the work herein contemplated in a diligent and workmanlike manner.

Contractor further covenants, warrants, and represents that all work performed by him hereunder shall be conducted in accordance with the most stringent safety regulations, precautions, and procedures and by employing all necessary or desirable protective equipment and devices, whether suggested or required by safety associations, government agencies, municipalities, or otherwise. Any breach of this safety covenant shall be grounds for immediate termination of this contract.

## 6. INDEPENDENT CONTRACTOR RELATIONSHIPS:

In the performance of the work herein contemplated Contractor is an independent contractor, with the authority to control and direct the performance of the details of the work. Gulf being interested only in the results obtained. But the work contemplated herein shall meet the approval of Gulf and be subject to the general right of inspection herein provided to Gulf to secure the satisfactory completion thereof.

## 7. INDEMNITIES AND INSURANCE:

Contractor agrees:

to pay off all just claims for labor, materials, and supplies furnished by contractor hereunder; to pay all carrier's and cartmen's charges, and to allow no lien or charge to become fixed upon any property of Gulf;

to pay all claims for damage to property in any manner arising from Contractor's operations hereunder;

to comply with all laws, rules, and regulations, Federal, State, and Municipal, which are now, or may in the future, become applicable to the Contractor, Contractor' business, equipment, and personnel engage in the operations covered by this instrument, or accruing out of the performance of such operations;

that this contract is a subcontract within the meaning of Executive orders 11246, as amended, 11701 and 11458, dealing with nondiscrimination and equal opportunity, and within the meaning of the Rehabilitation Act (Public Law 92-112) and the regulations issued thereunder, dealing with employment of the handicapped, and does hereby agree that it will comply with the provisions of said Executive orders which are incorporated herein by reference and made a part hereof.

to pay any and all claims which may be asserted or assessed against Gulf because of any infraction or violation of any Federal, State, or Municipal law, rule, or regulation, or for nonpayment of taxes, which are now, or may in the hereunder, or operations of any subcontractor to whom Contractor may have sublet any phase of it;

to protect, indemnify and save Gulf harmless from and against all claims, demands, and causes of action, suits or other litigation (including defending all causes of action, suits or other litigation, or indemnifying and holding Gulf harmless from and against all costs, expenses, and attorney's fees incurred by Gulf in the defense of such causes of action, suits or other litigation brought against it on account of any obligation which Contractor is bound for hereunder) of every kind and character arising in favor of Contractor or third parties, including but not limited to personnel furnished by Contractor, on account of personal injuries or death or damage to property, whether arising out of negligence on the part of Gulf or otherwise, including

any claim based upon the unseaworthiness of any vessel or upon any theory of strict liability, in any way occurring, incident to, or arising out of the work performed by Contractor hereunder, and particularly, but not by way of limitation, against any loss or damage whatsover caused by fire, explosions, or accidents of any kind duiring the performance of and until the completion of said work and the acceptance thereof by Gulf;

to protect, indemnify and save Gulf harmless from any loss or damage to property, equipment or materials, owned or furnished by Gulf in any way occurring, incident to or arising out of the work performed by Contractor hereunder when such loss or damage is caused by or results from the negligent act or omission of Contractor or Contractor's failure in any way to comply with the terms and provisions of this contract;

the agreements herein to indemnity and save Gulf harmless are in addition to Contractor's acceptance of general liability as an independent Contractor hereunder.

Contractor agrees to carry or will cause to be carried with an insurance company or companies satisfactory to Gulf and authorized to do business in the *areas of transportation and operation covered under this contract,* insurance coverage with limits of not less than those set forth in the next succeeding paragraph hereof, such coverage to include *but not limited to* Contractor's liability assumed under the indemnity and hold harmless provisions of this contract.

Workmen's Compensation and Employers' Liability Insurance with limits of liability of not less than $100,000 covering all of Contractor's employees, and all employees of any subcontractor engaged in the work to be performed hereunder;

Comprehensive General Liability
including Contractual Liability

Bodily Injury.....$300,000 each occurrence
Property Damage.....$100,000 each occurrence

Automobile Public Liability, including all owned, non-owned and hired automotive equipment used in connection with Contractor's operations hereunder

Bodily Injury.....$100,000 each person
Bodily Injury.....$300,000 each occurrence
Property Damage.....$100,000 each occurrence

In addition, for all work performed in the Gulf of Mexico, or in any other navigable waters, including but not limited to any bay, lake, river or stream, the following insurance requirements are applicable:

A. Endorsements to the Workmen's Compensation and Employers' Liability Policy extending the policy to provide when applicable:

(1) Federal Longshoremen's and Harbor Workers' Compensation Insurance and extended to the Outer Continental Shelf.

(2) Extension of Coverage B to provide Employers' Liability under Admiralty jurisdiction including the Jones Act, with Marine and Voluntary Compensation endorsed for transportation, maintenance, wages and cure with limits of not less than $100,000 per person, $200,000 per occurrence.

(3)In Rem Endorsement.

(4)Extension of territorial limits to include the *areas of transportation and operations of this contract.*

B. Endorsements to the Comprehensive General Liability Policy extending the policy to provide:

(1)Deletion of watercraft exclusion provision to cover all vessels not insured under a Protection and Indemnity Policy. Increased limits of not less than $200,000 per occurrence Bodily Injury and $100,000 Property Damage required on vessels.

(2)In Rem Endorsement.

(3)Extension of Territorial limits to include the *areas of transportation and operations of this contract.*

C. Hull and Machinery Insurance including collision liability equal to the full value of the vessel naming Gulf Oil Corporation as additional insured and providing adequate navigation limits to perform the work contracted hereunder.

D. Protection and Indemnity Insurance in an amount not less than the value of the vessel or $200,000, whichever is greater, naming Gulf Oil Corporation as additional insured and providing adequate navigation limits to perform the work contracted hereunder. Contractor may cover its obligation for loss of life or bodily injury to the crew of the vessel by extension of the Workmen's Compensation policy under Paragraph A (2).

E. Contractor shall require that all policies providing physical damage insurance on contractor's rig, tools and other equipment shall contain a waiver of subrogation against Gulf.

F. Contractor shall require that all policies providing the above described insurance, except the comprehensive General Liability and Property Damage and Automobile Public Liability and Property Damage, shall contain a waiver of subrogation against Gulf.

8. **CONTRACTOR'S EQUIPMENT RISK:**

Except as hereinabove provided, Contractor shall assume full risk for any damage to, or destruction of, Contractor's tools or other equipment resulting from any cause while in use on Gulf's property. Should Contractor insure said tools and equipment, such policies shall contain a waiver of subrogation against Gulf.

9. **ACCIDENT REPORTS TO BE FURNISHED BY CONTRACTOR:**

Contractor shall furnish Gulf a copy of its accident report covering each accident occurring on the premises covered by this contract during the performance of this contract.

10. **RETENTION OF RECORDS:**

Contractor agrees to retain all pertinent books, payrolls, and records relating to work performed hereunder for a period of not less than two years after completion thereof, and Gulf and its duly authorized representatives shall have access at all times to the books, payrolls, and records maintained by Contractor relating to any of the

work performed hereunder, and shall have the right to audit books, payrolls, and records at any reasonable time or times.

11. **CONFLICT WITH OTHER AGREEMENTS:**

In the event there should be any conflict between the provisions of this contract and any field work order, Contractor's work ticket, invoice, statement, purchase order, or any other type of written memoranda, or with any other contracts or agreements, whether written or oral, between Gulf and Contractor pertaining to the subject matter hereof, the provisions of this contract shall control.

12. **ASSIGNMENT OF CONTRACT:**

Contractor agrees not to sublet or assign this contract without the written consent of Gulf. If Contractor sublets or assigns without such consent, this contract may be terminated at the option of Gulf.

13. **ACCEPTANCE OF CONTRACT:**

The foregoing contract is accepted by the undersigned as Contractor, this 9th. day of June, 1980, subject to all of its terms and provisions, with the understanding that it will not be binding upon Gulf until Gulf has noted its acceptance, and with the further understanding that unless said contract is thus executed by Gulf, Contractor shall be in no manner bound by Contractor's signature hereto.

ACCEPTED:

Danor & Curole Marine Contractors, Inc.

Contractor

By /s/ Allen Danos

Title /s/ President

ACCEPTED:

GULF OIL CORPORATION

By /s/ illegible 6-13-80

Title Area Production Manager

Gulf Oil Exploration and Production Company, A Division of Gulf Oil Corporation

# GRAY & CO. INC.
## UNDERWRITING MANAGERS
## CERTIFICATE OF INSURANCE No. 184

This is to certify that insurance as described below has been issued to the Assured named below:

1. Name and Address of CERTIFICATE HOLDER

GULF OIL COMPANY
P. O. BOX 1012
HOUMA, LOUISIANA 70361

2. Name and Address of NAMED INSURED

DANOS & CUROLE MARINE CONTRACTORS, INC.
POST OFFICE BOX 217
LAROSE, LOUISIANA 70773

3. Period

JANUARY 1, 1980 TO JANUARY 1, 1983 * BOTH DAYS AT 12:01 A.M., CENTRAL STANDARD TIME

| 4. Coverage | Company | Policy No* |
|---|---|---|
| WORKMEN'S COMPENSATION<br>FEDERAL EMPLOYERS LIABILITY<br>COMPREHENSIVE GENERAL AND<br>AUTOMOBILE LIABILITY -<br>BODILY INJURY AND PROPERTY<br>DAMAGE | (THE NORTH RIVER<br>(INSURANCE COMPANY<br>(<br>(<br>(UNITED STATES FIRE<br>(INSURANCE COMPANY | XS-4633<br><br><br><br>XS-4634 |

5. Amount or Limit

WORKMEN'S COMPENSATION-STATUTORY/ EMPLOYERS LIABILITY/FEDERAL LONG-SHOREMEN'S AND HARBOR WORKERS' ACT/ OUTER CONTINENTAL SHELF ACT/JONES

ACT/DEATH ON THE HIGH SEAS ACT/VOLUNTARY COMPENSATION (MARITIME) INCLUDING TRANSPORTATION, WAGES, MAINTENANCE AND CURE/COMPREHENSIVE GENERAL LIABILITY INCLUDING BLANKET CONTRACTUAL FOR ALL WRITTEN CONTRACTS/PRODUCTS AND COMPLETED OPERATIONS/INDEPENDENT CONTRACTORS/ EXCLUSION ELIMINATED/ WATERCRAFT EXCLUSION ELIMINATED/ UTOMOBILE LIABILITY/ALL STATES ENDORSEMENT/ISSUED ON OCCURRENCE BASIS - $1,000,000.00 COMBINED SINGLE LIMIT.

* UP TO $150,000.00 IN THE NORTH RIVER INSURANCE COMPANY, MORRISTOWN, NEW JERSEY AND UNITED STATES FIRE INSURANCE COMPANY, NEW YORK, NEW YORK, COVER NOTES XS-4633 AND XS-4634 AND $850,000.00 IN INTER-NATIONAL SURPLUS LINES INSURANCE COMPANY, CHICAGO, ILLINOIS, COVER NOTES XSI-5990, XS-5991 AND XSI-5992.

Should the insurance herein described be cancelled, assigned or changed in such a manner as to affect this certificate, Gray & Company, Inc. will endeavor to give 10 (ten) days written notice to the certificate holder; but failure to do so shall impose no obligation or liability upon the Underwriters or Gray & Company, Inc.

SEE ATTACHED

Signed at Metairie, Louisiana, this 1st day of JANUARY 1980 cam

ISSUED: NOVEMBER 4, 1980 by /s/ M.P. Beuler

GRAY & COMPANY, INC.
2612 SEVERN AVENUE
METAIRIE, LA 70002

## APPENDIX G

### § 1302. Resources seaward of the Continental Shelf

Nothing in this subchapter or subchapter II of this chapter shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and sea bed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

(May 22, 1953. c. 65, Title II, § 9, 67 Stat. 32.)

### § 1331. DEFINITIONS

When used in this subchapter—

(a) The term "Outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(k) The term "exploration" means the process of searching for minerals, including (1) geophysical surveys where magnetic, gravity, seismic, or other systems are used to detect or imply the presence of such minerals, and (2) any drilling, whether on or off known geological structures, including the drilling of a well in which a discovery of oil or natural gas in paying quantities is made and the drilling of any additional delineation well after such discovery which is needed to delineate any reservoir and to enable the lessee to determine whether to proceed with development and

production;

(l) The term "development" means those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered;

(m) The term "production means those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling;

(q) The term "minerals" includes oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from "public lands" as defined in section 1702 of this title.

**§ 1332. Congressional declaration of policy**

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the Outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters above the Outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the Outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the Outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal states, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts; and

(B) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the Outer Continental Shelf;

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the Outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

(Aug. 7, a953, c. 345, § 3, 67 Stat. 462; Sept. 18, 1978, Pub.L. 95—372, Title II, § 202, 92 Stat. 634.)

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the Outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the

United States. State taxation laws shall not apply to the Outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting[1] any outstanding international boundary dispute respecting the Outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the Outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

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[1] So in original. Probably should be "settling".

(2) the term "employer' means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the Outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purposes of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], any unfair labor practice, as defined in such Act, occurring upon any artificial island, installation, or other device referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such subsection, except that until the President determines the areas within which such State laws are applicable, the judicial district shall be that of the State nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device

referred to in subsection (a) of this section whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is hereby extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section.

(f) Provisions as nonexclusive

The specific application by this section of certain provisions of law to the subsoil and seabed of the Outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

(Aug. 7, 1953, c. 345, § 4, 67 Stat. 462; Jan. 3, 1975, Pub.L. 93—627, § 19(f), 88 Stat. 2146; Sept. 18, 1978, Pub.L. 95—372, Title II, § 203, 92 Stat. 635; Sept. 28, 1984, Pub.L. 98—426, § 27(d)(2), 98 Stat. 1654.)

§ 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations

The Secretary shall administer the provisions of this

subchapter relating to the leasing of the Outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. in considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

§ 1337. Grant of leases by Secretary

**(a) Oil and gas leases; award to highest responsible qualified bidder; method of bidding; Congressional consideration of bidding system; notice; annual report to Congress**

(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the Outer Continental Shelf which are not covered by leases

meeting the requirements of subsection (a) of section 1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of—

**(h) State claims to jurisdiction over submerged lands**

Nothing contained in this section shall be construed to alter, limit, or modify any claim of any State to any jurisdiction over, or any right, title, or interest in, any submerged lands.

**§ 1343. Annual report by Secretary to Congress**

Within six months after the end of each fiscal year, the Secretary shall submit to the President of the Senate and the Speaker of the House of Representatives the following reports:

**§ 1344. Outer Continental Shelf leasing program**

**(a) Schedule of proposed oil and gas lease sales**

The Secretary, pursuant to procedures set forth in subsections (c) and (d) of this section, shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this subchapter. The leasing program to implement the policies of this subchapter. The leasing program shall consist of a schedule of proposed lease sales indicating, as precisely as possible, the size, timing, and location of leasing activity which he determines will best meet national energy needs for the five-year

period following its approval. Such leasing program shall be prepared and maintained in a manner consistent with the following principles:

(1) Management of the Outer Continental Shelf shall be conducted in a manner which considers economic, social, and environmental values of the renewable and nonrenewable resources contained in the Outer Continental Shelf, and the potential impact of oil and gas exploration on other resource values of the Outer Continental Shelf and the marine, coastal, and human environments.

## § 1347. Safety and health regulations

### (a) Joint study of adequacy of existing safety and health regulations; submission to President and Congress

Upon September 18, 1978, the Secretary and the Secretary of the Department in which the Coast Guard is operating shall, in consultation with each other and, as appropriate, with the heads of other Federal departments and agencies, promptly commerce a joint study of the adequacy of existing safety and health regulations and of the technology, equipment, and techniques available for the exploration, development, and production of the minerals of the Outer Continental Shelf. The results of such study shall be submitted to the President who shall submit a plan to the Congress of his proposals to promote safety and health in the exploration development, and production of the minerals of the Outer Continental Shelf.

### (b) Use of best available and safest economically feasible technologies (Text omited)

### (c) Regulations applying to unregulated hazardous working conditions (Text omitted)

**(d) Application of other laws**

Nothing in this subchapter shall affect the authority provided by law to the Secretary of Labor for the protection of occupational safety and health, the authority provided by law to the Administrator of the Environmental Protection Agency for the protection of the environment, or the authority provided by laws to the Secretary of Transportation with respect to pipeline safety.

**(e) Studies of underwater diving techniques and equipment (Text omitted)**

**(f) Coordination and consultation with Federal departments and agencies; availability to interested persons of compilation of safety regulations (Text omitted)**

**§ 1348. Enforcement of safety and environmental regulations**

**(a) Utilization of Federal departments and agencies**

The Secretary, the Secretary of the Department in which the Coast Guard is operating, and the Secretary of the Army shall enforce safety and environmental regulations promulgated pursuant to this subchapter. Each such Federal department may by agreement utilize, with or without reimbursement, the services, personnel, or facilities of other Federal departments and agencies for the enforcement of their respective regulations.

**(b) Duties of holders of lease permit (Text omitted)**

**(c) Onsite inspection of facilities (Text omitted)**

**(d) Investigation and report on major fires, oil spills, death, or serious injury (Text omitted)**

**(e) Review of allegations of violations (Text omitted)**

**(f) Summoning of witnesses and production of evidence (Text omitted)**

**(g) Report to Congress of violations and action taken (Text omitted)**

# APPENDIX H

La.RS.9:2780

**Certain indemnification agreements invalid**

A. The Legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the Legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to, or does provide for, defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of, or resulting from, death or bodily injury to persons, which is caused by, or results from, the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including, but not limited to, drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for, or production of, any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidential transportation, and other goods and services furnished in connection with any such service or operation.

D. (1) The provisions of this Section do not affect validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the worker's compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to procure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent

that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not extend to any party who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. For purposes of this Subsection, operating agreement and farmout agreement shall be defined as follows:

(a) "Operating agreement" means any agreement entered into by or among the owners of mineral rights for the joint exploration, development, operation, or production of minerals.
(b) "Farmout agreement" means any agreement in which the holder of the operating rights to explore for and produce minerals, the "assignor" agrees that it will, upon completion of the conditions of the agreement, assign to another, the "assignee," all or a portion of a mineral lease or of the operating rights.

E. This Section shall have no application to public utilities, the forestry industry, or companies who drill with the Frasch Process, so long as the work being performed is not any of the operations, services, or activities listed in Section C above, except to the extent those services or activities include drilling through the Frasch process.

F. The provisions of this Section do not apply to loss or liability for damages, or any other expenses, arising out of, or resulting from:

(1) Bodily injury or death to persons arising out of, or resulting from, radioactivity; or

(2) Bodily injury or death to persons arising out of, or resulting from, the retainment of oil, or resulting from, the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or valves and separators between the well head and the pipelines or failure of pipelines, so as to protect the safety of the general public and the environment or

(3) Bodily injury or death arising out of, or resulting from, performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term "wild well," as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect.

H. The provisions of this Act do not deprive a person who has transferred land, with a reservation of mineral rights, of the rights, of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations

for the exploration or production of minerals in connection with the reserved mineral rights; provided such person does not retain a working interest or an overriding royalty interest convertible to a working interest in any production obtained through activities described in Subsection C of this Section.

I. This Act shall apply to certain provisions contained in, collateral to, or affecting agreements in connection with the activities listed in Subsection C which are designed to provide indemnity to the indemnitee for all work performed between the indemnitor and the indemnitee in the future. This specifically includes what is commonly referred to in the oil industry as master or general services agreements or blanket contracts in whatever form and by whatever name. The provisions of this Act shall not apply to a contract providing indemnity to the indemnitee when such contract was executed before the effective date of this Act and which contract governs a specific terminable performance of a specific job or activity listed in Subsection C.

Supreme Court, U.S.
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CLERK

No. 86-74

In The
# Supreme Court of the United States
October Term, 1986

GULF OIL CORPORATION,

*Petitioner,*

vs.

DANOS & CUROLE MARINE CONTRACTORS, INC.,

*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## RULE 28.1 STATEMENT

The parties to the proceedings in the Fifth Circuit Court of Appeals were Richard J. Doucet, Gulf Oil Corporation, and Danos & Curole Marine Contractors, Inc., Gray & Company, Inc. (underwriting managers for Danos & Curole Marine Contractors, Inc.) was not a party to the proceedings in the Fifth Circuit Court of Appeals. Danos & Curole Marine Contractors, Inc. has no parent companies, partially owned subsidiary companies or affiliates.

At the time of the inception of the litigation Danos & Curole Marine Contractors, Inc. was wholly owned by Danos Brothers, Inc. On December 31, 1983 Danos & Curole Marine Contractors, Inc. and other wholly owned subsidiary companies of Danos Brothers, Inc. were merged into the parent company and the name was changed to Danos & Curole Marine Contractors, Inc.

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## SUMMARY OF ARGUMENT

1. The Louisiana Oilfield Indemnity Act is not in conflict with any express Federal law or regulations. It is part of the body of contract law of the State of Louisiana which is adopted as surrogate Federal law applicable to the offshore platforms by virtue of the Outer Continental Shelf Lands Act. 43 U.S.C. 1331 et seq.

2. The Louisiana Oilfield Indemnity Act does not conflict with Federal law pertaining to indemnity contracts as announced in decisions of this Court and in decisions of Circuit Courts of Appeals. The case primarily relied on by petitioner, *United States v. Seckinger*, 397 U.S. 203 (1970) is distinguishable as a case applying Federal "common law" to a contract which was itself a creature of the federal law and thus properly so interpreted. Other cases relied on by petitioner decide questions of Maritime law which clearly is not the law Congress intended to apply on the platforms on the Outer Continental Shelf. *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352 (1969).

3. The Fifth Circuit's decision is not in conflict with decisions of the Third Circuit Court of Appeals or with other decisions of the Fifth Circuit. The decisions that the Fifth Circuit's decision is alleged to be in conflict with either deal with a contract that is a creature of the Federal law properly interpreted by a rule of federal common law or simply cite the seminal case of *United States v. Seckinger*, 397 U.S. 203 (1970), for a general proposition of law.

4. The Louisiana Oilfield Indemnity Act is not inconsistent with the Longshore and Harbor Workers' Com-

pensation Act. 33 U.S.C. 901 et seq. The provisions of the Longshore and Harbor Workers' Compensation Act dealing with indemnity agreements pertain to claims against vessels. They do not deal with and were not intended to deal with contractual claims for indemnity between private parties performing operations on the Outer Continental Shelf.

5. The argument that petitioner paid for respondent's insurance was not raised in the Fifth Circuit nor decided in that court and should not be considered by this Court. The question of insurance is specifically dealt with in the Louisiana Oilfield Indemnity Act. Circumvention of the anti-indemnity provisions of the Louisiana Oilfield Indemnity Act by requirement of purchase of insurance is specifically prohibited. The policies themselves, insofar as they pertain to an indemnity contract, are thus voided.

6. The Louisiana Oilfield Indemnity Act does not impair any obligation of the contractual relationship involved in this case. The Louisiana Oilfield Indemnity Act affects only economic and commercial interests. It does not affect any fundamental interests and does not contain any suspect classification. The Louisiana Oilfield Indemnity Act is a rational attempt by a state legislature to advance a legitimate state interest. The Louisiana Oilfield Indemnity Act is not violative of the Contract Clause, Due Process Clause or the Equal Protection Clause of the United States Constitution.

———o———

## ARGUMENT

Petitioner seeks certiorari on the grounds that (1) the application of the Louisiana Oilfield Indemnity Act conflicts with express Federal law regarding conduct of activities on the Outer Continental Shelf; (2) the Louisiana Oilfield Indemnity Act conflicts with existing Federal law pertaining to indemnity agreements; (3) the Fifth Circuit's decision below conflicts with the Third Circuit's decision in *Beloit Power System, Inc. v. Hess Oil Virgin Islands Corp.*, 757 F.2d 1427 (3rd Cir. 1985); (4) the application of the Louisiana Oilfield Indemnity Act would deprive petitioner of the benefit of insurance for which it claims to have paid; and (5) the Louisiana Oilfield Indemnity Act is violative of the Contract Clause, Equal Protection Clause and the Due Process Clause of the United States Constitution. None of petitioner's arguments has merit.

### THE LOUISIANA OILFIELD INDEMNITY ACT DOES NOT CONFLICT WITH THE OUTER CONTINENTAL SHELF LANDS ACT, REGULATIONS PROMULGATED THEREUNDER OR ANY EXPRESS FEDERAL LAWS.

Petitioner first argues that the Louisiana Oilfield Indemnity Act preempts[1] expressed Federal law regulating the development and production of resources on the Outer Continental Shelf.

---

[1]Petitioner's use of the word preempt in its brief apparently means no more or no less than it contends that the Louisiana Oilfield Indemnity Act is inconsistent with the Federal law.

The Louisiana Oilfield Indemnity Act does not preempt any Federal law. The Louisiana Oilfield Indemnity Act is, in fact, surrogate Federal law applicable to the offshore platforms situated on the Outer Continental Shelf off of the coast of Louisiana. Congress, in adopting the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, et seq., clearly intended that the laws of the adjacent states be adopted as surrogate Federal law applicable to the offshore platforms. 43 U.S.C. 1333 (a) (2) (A); *Rodrigue v. Aetna Casualty and Surety Company,* 395 U.S. 352 (1969). That approach was chosen in order to deal with the full range of legal relationships which Congress recognized would exist amongst the parties doing business or conducting activities on the Outer Continental Shelf. Congress realized that the Outer Continental Shelf Lands Act and the full body of Federal law would not be broad enough to cover all situations because the Federal law is simply not a comprehensive body of law which deals with all aspects of all types of legal relationships existing in these United States.

Petitioner does not point to any specific Federal statute or any specific Federal regulation with which the Louisiana Oilfield Indemnity Act is alleged to be inconsistent. That is so because there is no such Federal statute or Federal regulation. Nor is there any Federal jurisprudential rule with which the Louisiana Oilfield Indemnity Act is inconsistent. This is seen in the discussion of the next topic, "The Louisiana Oilfield Indemnity Act Does Not Conflict with Existing Federal Law."

Petitioner asserts that the Louisiana Oilfield Indemnity Act is not applicable on the Outer Continental Shelf

because it "attempts" to participate in the administration, production, and development of an area outside of state boundaries and jurisdiction. That is not so. The Louisiana Oilfield Indemnity Act is one small part of the law of the State of Louisiana which pertains to contractual relationships between private individuals. It is part of the adjacent state contractual law which Congress intended to adopt as Federal law applicable on the Outer Continental Shelf just as Congress intended to have other "bodies" of state law (such as the tort law) so apply. *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352 (1969), *Chevron Oil Company v. Huson*, 404 U.S. 103 (1971).

**THE LOUISIANA OILFIELD INDEMNITY ACT DOES NOT CONFLICT WITH EXISTING FEDERAL LAW.**

Petitioner next argues that the Louisiana Oilfield Indemnity Act conflicts with existing federal law pertaining to indemnity contracts. That is not the case.

Petitioner cites this Court's decision in *United States v. Seckinger*, 397 U.S. 203 (1970), for the proposition that there is a body of Federal law concerning indemnity agreements and that application of the Louisiana Oilfield Indemnity Act would be in conflict with that body of Federal law as announced by this Court in *Seckinger*. Petitioner's reliance is misplaced.

*United States v. Seckinger*, 397 U.S. 203 (1970), dealt with a contract between the United States Government and a private contractor. The contractor, the Seckinger Company, had contracted with the United States Government

to provide certain plumbing work at a military base. The government drafted and entered into the contract pursuant to authority conferred by federal statute and in accord with the rules and regulations promulgated by the Administrator of General Services under authority of statute.

In discussing the law applicable to the contract at issue, this Court said,

> Preliminarily, we agree with the Court of Appeals that federal law controls the interpretation of the contract. (Citations omitted) *This conclusion results from the fact that the contract was entered into pursuant to authority conferred by federal statute and, ultimately, by the Constitution. United States v. Seckinger*, 397 U.S. at 209, 210. (emphasis added)

This Court was correct in fashioning a federal rule to apply to the contract involved in *Seckinger*. The contract itself was a creature of Federal law. The terms of the contract were set out in Federal regulations!

The holding in *Seckinger* certainly does not establish a rule that must be followed in interpreting contracts between private parties.

The holding in *Seckinger* does not establish a Federal law of indemnity inconsistent with application of a state rule of law as surrogate Federal law to contracts between private parties for work to be performed on the Outer Continental Shelf. There is no Federal *general* common law, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and there is no Federal common law pertaining to indemnity contracts between private parties.

Petitioner points out that there is a body of Maritime law interpreting indemnity clauses in maritime contracts.

Petitioner states that an indemnity clause in a maritime contract is interpreted according to Federal law rather than state law. By "Federal law" in that context petitioner surely means the Maritime law. However, this Court in *Rodrigue v. Aetna Casualty and Surety Company,* 395 U.S. 352 (1969), and *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), held that the Maritime law is not applicable on offshore structures. The Court in those cases held that the law applicable is Federal law as set out in the Outer Continental Shelf Lands Act itself which adopts state law as surrogate Federal law where not inconsistent with other Federal laws and regulations. 43 U.S.C. 1333 (a) (2) (A).

**THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH OTHER DECISIONS OF CIRCUIT COURTS OR ITS OWN DECISIONS.**

Petitioner asserts that the Fifth Circuit's decision is in conflict with the Third Circuit's decision in *Beloit Power Systems, Inc. v. Hess Virgin Islands Corp.,* 757 F.2d 1427 (3rd Cir. 1985). At issue in *Beloit* was the interpretation of an indemnification clause in a contract between Beloit Power Systems. Inc. and Hess Oil Virgin Islands Corp. The court very clearly applied the law of the Virgin Islands to the issue of contractual indemnity before it. *Beloit Power Systems, Inc. v. Hess Virgin Islands Corp.,* 757 F.2d at 1430. It cited *Seckinger* for the proposition that *generally* the law permits a contractual indemnitee to recover for his own negligence when the contract clearly so provides. Absent the specific prohibition of the Louisiana Oilfield Indemnity Act Louisiana law would so provide as well. The fact that the law of

the Virgin Islands generally permits indemnity while the law of the State of Louisiana specifically prohibits it in certain circumstances has no bearing on this case. The Fifth Circuit's decision is not in conflict with the Third Circuit's decision in *Beloit* or in the Third Circuit's decision in *Eastern Airlines v. Insurance Co. of North America*, 758 F.2d 132 (3rd Cir. 1985) which simply followed the court's earlier decision in *Beloit*.

In *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974) the Fifth Circuit correctly followed the law as set out in *Seckinger* because it was also dealing with a contract to which the United States Government was a party. In *Smith* the court quoted *Seckinger* saying:

> We observe initially that here, as there, the interpretation of the contract is controlled by federal law, which was entered into "pursuant to authority conferred by federal statute and, ultimately by the Constitution." 497 F.2d at 507. (citation omitted)

That holding is not inconsistent with the holding in the instant case.

**THE LOUISIANA OILFIELD INDEMNITY ACT IS NOT INCONSISTENT WITH THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AS INCORPORATED IN THE OUTER CONTINENTAL SHELF LANDS ACT.**

Petitioner argues that the Louisiana Oilfield Indemnity Act is inconsistent with Section 905 (B) and (C) of the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. 901 et seq. That argument is misplaced.

Section 905 (B) and Section 905 (C) of the Longshore and Harbor Workers' Compensation Act deal with claims

against vessels. There is nothing in those sections of the Act or in the legislative history which indicates any intention of the Congress to deal with anything other than the liability of vessels.

The Longshore and Harbor Workers' Compensation Act does not deal with contractual indemnity agreements between employers and nonvessels on the Outer Continental Shelf. Petitioner is correct that nothing in the Longshore and Harbor Workers' Compensation Act prevents the application of contractual indemnity agreements between employers and nonvessels. There is also nothing in the Longshore and Harbor Workers' Compensation Act that provides that a state cannot proscribe indemnity agreements between employers and nonvessels. The Longshore and Harbor Workers' Compensation Act simply does not deal with those matters. It is a matter left to be dealt with by application of the state law as surrogate Federal law as clearly and specifically provided by the Outer Continental Shelf Lands Act. 43 U.S.C. 1333 (a)(2)(A)

**GULF'S CONTENTIONS RELATIVE TO PAYMENT FOR INSURANCE.**

Petitioner asserts that it paid for Danos & Curole Marine Contractors, Inc.'s insurance. Petitioner further asserts that Danos & Curole Marine Contractors, Inc.'s insurer has already been paid to provide protection to Gulf but is not required to do so by the decision below. Danos & Curole Marine Contractors, Inc.'s insurer is not a party to the litigation. No contention was made in the Court of Appeals below that the contract at issue should be enforced in the face of the specific clear prohibition

of the Louisiana Oilfield Indemnity Act simply because there may be insurance to cover the contractual obligation undertaken by Danos & Curole Marine Contractors, Inc. This Court does not normally decide issues not presented below though it is not precluded from doing so. *Carlson v. Green,* 446 U.S. 14 (1980) at 15 n. 2. There is no reason to consider that issue in this case and respondent urges the Court not to do so. The Louisiana Oilfield Indemnity Act specifically deals with the question of insurance stating,

> Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect. La. R.S. 9:2780 (G)

The Louisiana statute very clearly invalidates any requirement in any contract requiring insurance that would effectively accomplish what the indemnity provision of the contract is prohibited from doing. That invalidates the insurance provision as well.

## THE LOUISIANA OILFIELD INDEMNITY ACT DOES NOT VIOLATE THE CONTRACT CLAUSE, THE DUE PROCESS CLAUSE OR THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

### CONTRACT CLAUSE

The first step in analyzing a challenge to a state statute based on the contract clause is an inquiry as to whether there has been a substantial impairment of a contractual

relatic .ship. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978). There is no substantial impairment in this case. The contract is what is commonly known in the industry as a "blanket service contract." It is intended to cover all work performed by one party for the other during the continued existence of the contract. For each new job that was to be performed Gulf had to contact Danos & Curole Marine Contractors, Inc. and request that Danos & Curole Marine Contractors, Inc. undertake the job, and Danos & Curole Marine Contractors, Inc. was free to decline, without penalty. If the job were accepted it would be subject to the blanket service contract. The job which was being performed at the time of the incident at issue was one for which the initial call was made after enactment of the Louisiana Oilfield Indemnity Act.

The contract, by its terms, provides that it may be cancelled by either party simply by giving ten (10) days written notice to the other party. The blanket service contract was executed by the parties prior to enactment of the Louisiana Oilfield Indemnity Act, but, as indicated above, the job in question arose after the enactment. Both parties left the contract in effect subsequent to enactment of that statute subject, still, to the provision that either party could cancel simply by giving notice to the other. Petitioner surely cannot claim any "vested" rights that have been substantially impaired. No rights have been impaired at all.

Even if there has been an impairment of contractual rights, the statute passes constitutional muster if it is a rational attempt by the state legislature to advance a legitimate state interest. *Exxon Corp. v. Eagerton,* 462 U.S.

176 (1983). As the Fifth Circuit Court of Appeals said in *Knapp v. Chevron U.S.A., Inc.*, 781 F.2d 1123 (5th Cir. 1986), another case construing the same legislation,

> If not the most important industry, the oil, gas and mineral industry is one of the most important industries in the State of Louisiana. Its tremendous impact on the vitality and well-being of the state's economic life cannot be gainsaid . . .
>
> One who remains liable and exposed for his own negligence is more likely to act with care. This act is a rational attempt to improve oilfield safety. It is not unconstitutional. 781 F.2d at 1130.

The statute is a rational attempt to advance safety in the workplace among other state interests.

## DUE PROCESS CLAUSE

The challenged statute adjusts only the economic relationship between the parties to the contract. The act thus enjoys a presumption of constitutionality and the burden is on the party challenging it to show that the legislature has acted in an arbitrary or irrational way. *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1 (1976). For the reasons discussed in the next preceding section regarding the Contract Clause it is clear that the Louisiana legislature had a rational purpose for the enactment of the statute and it advanced that purpose in a reasonable way.

## EQUAL PROTECTION CLAUSE

The Louisiana Oilfield Indemnity Act does not adversely affect a fundamental interest nor does it contain

a classification based on a suspect criterion. Accordingly, it is not subject to challenge on equal protection grounds as long as the legislature enacting it,

> . . . could have reasonably concluded that the challenged classification would promote a legitimate state purpose. *Exxon Corp. v. Eagerton,* 462 U.S. at 196. (citation omitted)

The statute applies equally to parties involved in the mineral industry in the State of Louisiana. For the reasons discussed by the Fifth Circuit Court of Appeals in *Knapp v. Chevron U.S.A.,* 781 F.2d 1123 (5th Cir. 1986) set out in the section above pertaining to the Contract Clause, the classification would and does promote a legitimate state purpose and the legislature could have reasonably so concluded.

———o———

## CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

GULF OIL CORPORATION

Petitioner

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF ON BEHALF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## STATEMENT CONCERNING INTEREST OF *AMICI CURIAE*

*Amici curiae,* Amoco Production Company, Marathon Oil Company, McMoRan Oil & Gas Co., Pennzoil Producing Company, Transco Exploration Company and Union Oil Company of California, are companies involved in the exploration and production of the resources of the Outer Continental Shelf. Each company is involved in many contracts directly effected by the decision below. *Amici curiae* have a vital interest in the proper interpretation of contracts governing operations offshore, and the rules of law used to interpret those contracts.

No. 86-74

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

GULF OIL CORPORATION

Petitioner

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.

Respondent

# BRIEF ON BEHALF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

## SUMMARY

*Amici curiae*[1] submit that the Fifth Circuit Court of Appeals in this Case, as in the case of *Matte v. Zapata Offshore Co.*, 784 F.2d 628 (5th Cir. 1986), *cert. applic. pending* (No. 85-2023), misinterpreted the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C § 1331 *et seq.* (the "Lands Act"), by relying on state law that is inconsistent with federal common law and the Longshore and Harbor

[1] Amoco Production Company, Marathon Oil Company, McMoRan Oil & Gas Co., Pennzoil Producing Company, Transco Exploration Company, and Union Oil Company of California. This brief is filed with consent of all parties, and letters reflecting consent are on file with the Clerk of the Supreme Court.

Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* (the "Longshore Act").[2]

The Lands Act allows the use of state law only when there is no applicable federal law and only when the state law is "not inconsistent" with federal law. Federal common law, however, allows full contractual freedom with respect to contractual indemnity. Under *United States v. Seckinger,* 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970), a party can be indemnified for its own negligence if such intent is clearly set forth in the applicable contract. The same is true, in the non-vessel context, under the Longshore Act. The Louisiana Oilfield Indemnity Act, La. Rev. Stat. § 9:2780 (the "Louisiana Indemnity Act"), which prohibits full indemnity, is inconsistent with federal law and cannot control in a case governed by the Lands Act.

## REASONS FOR GRANTING THE WRIT

### I. *LOUISIANA'S PROHIBITION OF CONTRACTUAL INDEMNITY CANNOT CONTROL ON THE OUTER CONTINENTAL SHELF BECAUSE LOUISIANA LAW CONFLICTS WITH APPLICABLE FEDERAL LAW*

"All law applicable to the Outer Continental Shelf is federal law." *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 480, 101 S.Ct. 2870, 2876, 69 L.Ed.2d 784 (1981). If necessary, the Lands Act supplements "gaps in the

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[2] While this brief is submitted to emphasize that the state law applied by the Fifth Circuit is inconsistent with federal law, *amici curiae* support all of the arguments advanced by Gulf Oil Corporation in its Petition for Writ of Certiorari.

Federal law with state law through 'adoption of State law as the law of the United States, ' " *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 357, 89 S.Ct. 1835, 1838, 23 L.Ed.2d 360 (1969), but "federal law is 'exclusive' in its regulation of [the Outer Continental Shelf], and . . . state law is adopted only as surrogate federal law." *Id.*

Any state law incorporated by the Lands Act must be consistent with federal law. *Rodrigue, supra*, 395 U.S. at 360, 89 S.Ct. at 1839-40.

> To the extent that they are applicable *and not inconsistent* with this subchapter or with other Federal laws and regulations of the Secretary . . . , the civil and criminal laws of each adjacent State . . . are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

43 U.S.C. § 1333(a)(2)(A) (emphasis added). Moreover, under *Rodrigue*, if there is applicable federal law, state law should not be used.

In *Rodrigue*, based on both traditional maritime principles and Congressional intent, this Court held that federal admiralty law does not govern accidents on "artificial islands" on the Outer Continental Shelf. This was not a rejection of federal common law but rather a recognition that maritime law did not extend to "accidents [that] had no more connection with the ordinary stuff of admiralty than to accidents on piers." 395 U.S. at 360, 89 S.Ct.at 1839-40. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414,

____, 105 S.Ct. 1421, 1426, 84 L.Ed.2d 406 (1985). *Rodrigue* concluded that *maritime law* was thus inapplicable to the plaintiff's non-maritime claim, and the resulting lack of applicable federal law "*remove[d] any obstacle* to the application of state law by incorporation as federal law through the Lands Act." 395 U.S. at 366, 89 S.Ct. at 1842 (emphasis added). Contrary to the Fifth Circuit's assertion in this case and *Matte v. Zapata Offshore Co.*, 784 F.2d at 630, however, *Rodrigue* does not even mention federal common law and certainly does not hold that federal common law is inapplicable on the Outer Continental Shelf. As federal common law and the Longshore Act allow full indemnity, inconsistent Louisiana law cannot be relied on in a Lands Act case.

(a) Federal Common Law Allows Full Contractual Indemnity

The Louisiana Indemnity Act, La. Rev. Stat. § 9:2780, which precludes indemnity for one's own fault, directly conflicts with federal common law. *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970), allows full indemnity when clearly provided for by contract and represents well-established federal common law. *See, e.g., Tran v. Manitowoc Engineering Co.*, 767 F.2d 223, 229 (5th Cir. 1985). In the instant case, however, the Fifth Circuit rejected *Seckinger's* applicability and held that, in any event, federal common law is in effect relegated to a status inferior to state law. In so holding, the court misapplied *Rodrigue* and the entire scheme of the Lands Act. Federal common law is "federal law." *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 98-100, 92 S.Ct. 1385, 1390-91, 31 L.Ed.2d 712 (1972). Therefore, inconsistent state law must yield.

Whether federal common law can be ousted by inconsistent state law was specifically discussed but not decided in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981). At issue in *Gulf Offshore* was whether the jury in a claim governed by the Lands Act should have been instructed, in accordance with federal common law,[3] that personal injury damage awards are not subject to federal income taxation.

> If Congress had been silent about the source of federal law in an OCSLA personal injury case, *Liepelt* would require that the instruction be given.
>
> But Congress was not silent. It incorporated for this case the applicable law of Louisiana, but only "[t]o the extent [it is] not inconsistent" with federal law. *The [Lands Act] does not distinguish between federal statutory and judge-made law. It would seem then that if Louisiana law is "inconsistent," Liepelt controls.*

453 U.S. at 487, 101 S.Ct. at 2880 (emphasis added). Although this Court expressed a question as to whether federal common law would necessarily control that particular case, the issue was not decided because it was unclear whether Louisiana law was in fact inconsistent with *Liepelt*.

The Fifth Circuit in *Olsen v. Shell Oil Co.*, 708 F.2d 976, 982-83 (5th Cir. 1983), *cert. denied*, 464 U.S. 1045, 104 S.Ct. 715, 79 L.Ed.2d 178 (1984), subsequently rejected the federal common law rule of *Liepelt* on the ground that the

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[3] *Norfolk & Western R. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

underlying cause of action was derived from state law under the Lands Act. In so holding, the Fifth Circuit relied on its contention that state law governing admissibility of evidence concerning inflation was an integral component of the state law cause of action and that under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the *Liepelt* rule should yield to state law.

The Fifth Circuit in *Olsen*, however, misapplied *Huson*. In *Huson*, this Court held that when a cause of action for personal injury occurring on a fixed platform is based on state law, state law should provide the limitations period as well, "*subject to the absence of* inconsistent and applicable federal law." 404 U.S. at 103, 92 S.Ct. at 354 (emphasis added). As admiralty law was inapplicable under *Rodrigue*, there was no applicable federal limitations rule. Finding it inappropriate to create new federal common law, *Huson* looked to the state limitations period. Neither *Huson* nor *Rodrigue* denegrated the role of federal common law on the outer Continental Shelf; *Rodrigue* merely held "admiralty" law inapplicable to "artificial islands," and *Huson* held that because there was a "gap," it was more appropriate to rely on state law than *to create* new federal common law. Neither *Rodrigue* nor *Huson* sanctions the use of state law *that is inconsistent with established federal law*, as evidenced by the fact that the question surfaced in *Gulf Offshore*, ten years after *Huson*. *Huson's* decision not to create *new* federal common law is irrelevant when there is already well-established federal common law such as *Seckinger*. The Fifth Circuit 's decision in *Olsen* was therefore incorrect, and the question left open in *Gulf Offshore* must be answered.

Even if *Olsen's* rationale were correct, the critical underpinning of the decision – that the state rule on inflation was an integral component of the underlying state law cause of action – is not present in this case. The indemnity rule of *Seckinger* is not an integral component of any particular cause of action but rather constitutes an important part of the federal law governing contract interpretation. As stated in numerous cases following *Seckinger*,[4] the intent of the parties, when clearly expressed, should be enforced, including the intent to provide complete indemnity.

In light of *Seckinger*, there is no "gap" in this case. Moreover, ignoring such a federal rule of contract interpretation carries implications far beyond the subject of this case. That would give states adjacent to the Outer Continental Shelf the power to overrule federal law. Prior to the Louisiana Indemnity Act, Louisiana allowed complete indemnity. Louisiana decided to change its own law, but the Louisiana legislature does not have the power to overrule federal law on the Outer Continental Shelf – particularly not when the Lands Act mandates that any incorporated state law must be consistent with federal law.

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[4] *See, e.g., Tran v. Manitowoc Engineering Co.*, 767 F.2d 223, 229 (5th Cir. 1985); *Eastern Airlines, Inc. v. Insurance Co. of North America*, 758 F.2d 132, 135 (3rd Cir. 1985); *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands Corp.*, 757 F.2d 1427, 1430 (3rd Cir. 1985); *Gibbs v. United States*, 599 F.2d 36, 40-41 (2d Cir. 1979); *Smith v. United States*, 497 F.2d 500, 509 (5th Cir. 1974); *United States v. Hollis*, 424 F.2d 188, 190-91 (4th Cir. 1970).

(b) The Longshore Act, In the Non-Vessel Context, Allows Full Contractual Indemnity

The Louisiana Indemnity Act not only conflicts with *Seckinger*, it conflicts with the entire scheme of the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. § 901 *et seq.* (the "Longshore Act"). The jurisprudential development and legislative history of the Longshore Act show that contractual indemnity is available except where specifically prohibited.

Section 905(a) of the Longshore Act[5] provides that an employee's exclusive remedy against his employer shall be that provided in the Act. This exclusivity provision precludes any claim for *tort* indemnity against an employer by a third party defendant. *Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1021-22 (1st Cir. 1985) *cert. denied*, ____ U.S. ____, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 719-22 (2d Cir. 1978); *Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Service, Inc.* 377 F.2d 511, 512 (5th Cir.), *cert. denied*, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967).

In contrast, however, full *contractual* indemnity is available under section 905(a), including indemnity for the fault of the indemnitee when clearly provided for by contract. *Pippen v. Shell Oil Co.*, 661 F.2d 378, 386-88 (5th Cir. 1981); *Olsen v. Shell Oil Co.*, 595 F.2d 1099, 1103-04 (5th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 721-22 (2d Cir. 1978). The Louisiana Indemnity Act is

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[5] 33 U.S.C. § 905(a).

therefore inconsistent with the Longshore Act.

The availability of contractual indemnity is underscored by the legislative history of the Longshore Act. Prior to the 1972 amendments to the Longshore Act, the combination of implied contractual indemnity under then section 905 (now section 905(a)) and the effect of this Court's decisions in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), had given rise to the so-called *Sieracki-Ryan* triangle. Under *Sieracki*, a longshoreman doing work customarily performed by a seaman was owed a warranty of seaworthiness by the vessel, which gave rise to liability without fault. Under *Ryan*, however, the vessel owner was entitled to implied contractual indemnity from the longshoreman's employer, based on the breach of an implied warranty of workmanlike performance. As a result, the employer was liable for compensation under the Longshore Act but was also often required to indemnify the vessel owner for the employee's tort recovery.

The *Sieracki-Ryan* triangle was terminated with the 1972 amendments to the Longshore Act. Congress reenacted the previous section 905 as section 905(a) and added section 905(b). Section 905(b) prohibited a "vessel" from obtaining any indemnity from the employer of the injured longshoreman, whether based on an implied or express contractual provision. There was no change, however, in the right of a "non-vessel" to obtain contractual indemnity. *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 719-22 (2d Cir. 1978).

> The shipowners got a *quid pro quo* for the loss of their indemnity rights. Prior to the 1972 amendments they were liable to injured longshoremen not only for the ship's own negligence but also on a strict liability theory (the "unseaworthiness" doctrine) for conditions which often were actually created by the stevedore. . . . The 1972 amendments eliminated the unseaworthiness theory and limited vessel liability to negligence in exchange for the surrender of the vessel's indemnity rights. . . . *No such quid pro quo was offered to non-vessels.* Given the clear statutory language and the absence of legislative history at variance with it, we would hesitate to hold that section 905(b) by its own force cuts off the availability of *Ryan* indemnity to a non-vessel in all cases where the concurring negligence of a stevedoring company has caused injuries to the latter's employees, . . . where there is a direct contractual relationship between the third party and the stevedore or where the third party is designated as a beneficiary of an express contract between the stevedore and a vessel.

*Id.* at 721-22 (citations and footnote omitted) (emphasis added). The Fifth Circuit, relying on *Zapico's* rationale, has agreed.

> Until Congress more specifically abrogates this judicial remedy of contractual indemnity owed to nonvessels by the employer, it would appear to continue to be available.

*Pippen v. Shell Oil Co.*, 661 F.2d 378, 387 (5th Cir. 1981). *See Olsen v. Shell Oil Co.*, 595 F.2d 1009, 1103-04 (5th Cir.), *cert. denied*, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979).

Congress again amended section 905 of the Longshore Act in 1984. Section 905(c) was added to allow a "vessel" to obtain contractual indemnity in the context of a reciprocal indemnity provision. Again, however, there was no change in the availability of contractual indemnity by a non-vessel under section 905(a). When Congress amends or reenacts a statute without changing well-established jurisprudence, Congress must be considered to have ratified that jurisprudence. *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 271-73, 99 S.Ct. 2753, 2762-63, 61 L.Ed.2d 521 (1979).

The Longshore Act allows complete contractual indemnity under section 905(a). Such evidence of Congressional intent cannot be ignored by a state legislature. No such result is required by or sanctioned by the Lands Act, which incorporates state law only when necessary and only when "not inconsistent" with federal law. 43 U.S.C. § 1333(a)(2)(A).

## CONCLUSION

As stated by this Court in *Rodrigue,* Congress enacted the Lands Act to define the law applicable to the Outer Continental Shelf. 395 U.S. at 355, 89 S.Ct. at 1837. In so doing, Congress chose to rely on state law to fill gaps -- not to oust applicable federal law allowing freedom of contract. The exploration and development of the resources of the Outer Continental Shelf requires extensive financial commitment and the coordination of numerous companies providing an almost unlimited range of services. The development of the Shelf's resources has spawned many different companies, performing various services, pursuant to numerous different contracts. The indemnity provisions in those contracts, like all the other provisions, should be

interpreted in accordance with the intent of the parties when clearly expressed. These indemnity provisions are important in allowing the parties to a contract to allocate their respective risks of liability.

*Seckinger* and the Longshore Act permit such contractual allocation of risk. The *Seckinger* rule on indemnity is a single, but important, facet of the general rule of contractual freedom. The Louisiana legislature does not have the power to oust such federal law.

Uniformity may not be required in determining whether a person injured on a fixed platform off the coast of Louisiana has the same limitations period for bringing an action, or the same damage instructions to the jury, as an individual injured on a platform offshore Texas. However, basic uniformity is essential in interpreting contracts that govern economic development of the entire Outer Continental Shelf. That the Lands Act contemplated use of divergent state laws as federal law *in appropriate instances* does not justify ignoring the fact that the Lands Act incorporates state law only where "not inconsistent with [the Lands Act] or with other federal laws,"[6] whether it be the federal common law, the Longshore Act, or other federal laws.

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[6] 43 U.S.C. § 1333(a)(2)(A).

The Louisiana Indemnity Act is inconsistent with federal law. It therefore cannot apply on the Outer Continental Shelf.

Respectfully submitted,

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NO. 86-74

# In the Supreme Court of the United States

OCTOBER TERM, 1986

GULF OIL CORPORATION

Petitioner

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF ON BEHALF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## CONSENT OF PARTIES

Texaco Inc., Amicus Curiae herein, has obtained the written consent of Gulf Oil Corporation (Petitioner) and Danos & Curole Marine Contractors, Inc. (Respondent) to the filing of this Brief of Amicus Curiae in Support of Petition for Writ of Certiorari.

## INTEREST OF AMICUS CURIAE

Texaco Inc. is an interstate corporation engaged *inter alia* in the development and production of minerals from federal leases located on the Outer Continental Shelf. Texaco Inc. has extensive operations in federal waters in the Gulf of Mexico, including Offshore Louisiana, which may be dramatically affected by the lower court's ruling extending the Louisiana Oilfield Indemnity Act to fixed platforms on the Outer Continental Shelf.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

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GULF OIL CORPORATION

Petitioner

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.

Respondent

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## SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit erred in extending the Louisiana Oilfield Indemnity Act ("LOIA") to fixed platforms located on the Outer Continental Shelf ("OCS"). The Outer Continental Shelf Lands Act ("OCSLA") authorizes application of federal law in resolving questions and issues arising in the OCS. At the same time, however, the OCSLA adopts the law of the adjacent state as surrogate federal law to the extent that it is not inconsistent with applicable federal laws and regulations. 43 U.S.C. § 1333(a)(2)(A) (1983). The intent behind OCSLA was to treat artificial structures covered by the act as federal enclaves for purposes of defining applicable law. *See, Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, (1969).

The LOIA attempts to nullify and void as "against public policy of the State of Louisiana" any and all contract provisions which seek to indemnify and hold harmless a party against liability for personal injury. La. Rev. Stat. Ann. § 9:2780 (West Supp. 1985).

The LOIA cannot apply to fixed platforms located on the OCS since: 1) it is preempted by a comprehensive body of federal law governing the exploration, development and production of hydrocarbons from the OCS; 2) it is inconsistent with a federal body of common law recognizing the validity of indemnity contracts; 3) it is an impermissible extension of a state's exercise of its police power imparing the obligation of contracts into an area of exclusive federal jurisdiction; and 4) it imposes an undue burden on interstate commerce.

## ARGUMENT

### I.

### LOIA DOES NOT APPLY TO THE OCS SINCE IT IS PREEMPTED BY AN EXHAUSTIVE BODY OF FEDERAL LAW GOVERNING THE EXPLORATION, DEVELOPMENT AND PRODUCTION OF MINERALS FROM THE OCS.

In 1953 Congress enacted the OCSLA, 43 U.S.C. § 1331-56 (1983), extending the power to the federal government to grant oil and gas leases to various areas on the OCS and to control the exploration, development and production of subsurface mineral resources. The federal government was thus granted exclusive jurisdiction over the OCS to the exclusion of adjacent states. *See, United States v. Texas,* 339 U.S. 707, reh'g denied, 340 U.S. 907 (1950); *United States v. Louisiana,* 339 U.S. 699, reh'g denied, 340 U.S. 856 (1950); *United States v. California,* 332 U.S. 19, reh'g denied, 332 U.S. 787 (1947); *Maryland v. Louisiana,* 451 U.S. 725 (1981). A comprehensive body of federal law and regulations rapidly developed which

governed all activities concerned with the production and development of hydrocarbons from the OCS. As a result, numerous federal agencies control virtually every aspect of this industry. The Department of the Interior awards leases. 43 U.S.C. § 1347 (1983). The Coast Guard provides safety and health regulations. 43 U.S.C. § 1348 (1983). The Mineral Management Service administers royalties and technical or engineering activities on the OCS. 43 U.S.C. § 1334 (1983). And the Federal Energy Regulatory Commission controls transportation and in some cases prices of natural gas produced from the OCS under the auspices of the Natural Gas Policy Act of 1978. 15 U.S.C. § 3301-432 (1983).

In a complex, capital intensive undertaking such as the production of subsea minerals there is necessarily a great deal of work which must be performed on a contract basis by a variety of companies with expertise in different fields. An important element of this contracting is the allocation of risks agreed to by the parties, often through indemnity agreements. The LOIA nullifies as against the public policy of the State of Louisiana any and all such provisions which indemnify a party against liability for personal injury. La. Rev. Stat. Ann. § 9:2780 (West Supp. 1985). Adoption of the LOIA as surrogate federal law under 43 U.S.C. § 1333(a)(2)(A) (1983) would directly affect the relationship of the contracting parties by altering agreed upon financial burdens and would directly impact operations for the development and production of minerals from the OCS by making certain economic evaluations concerning the development of federal leases dependent upon the law of the adjacent states. Since a state does not have jurisdiction to enact any laws directly controlling or administering operations on the OCS, to allow such a result

through an indirect action by the extension of the LOIA to fixed platforms on the OCS would circumvent the structure and purpose of the OCSLA. One concern would be an erosion of the uniformity created by the OCSLA to govern the orderly development of the OCS. It is well settled that, even in areas of state jurisdiction, federal law may be preemptive where the need for uniformity exists. In this instance, the converse is apparent. Louisiana state law has the direct effect of undermining uniformity in an area of exclusive federal jurisdiction. The fact that different adjacent states may attempt to enact inconsistent laws concerning indemnity and other aspects of a party's contractual relationship could operate to impede development of certain areas of the OCS, disrupt the goal of orderly development inherent in the OCSLA and impose a burden on interstate commerce.

## II.

## THE LOIA IS IN DIRECT CONFLICT WITH FEDERAL COMMON LAW WHICH UPHOLDS THE VALIDITY OF INDEMNITY CONTRACTS.

In addition to being inconsistent with a comprehensive body of federal law regulating operations on the OCS, the LOIA is directly in conflict with a body of federal common law permitting indemnity contracts.

In *United States v. Seckinger*, 397 U.S. 203 (1970), this Court used "federal law" to interpret a contract and permitted an indemnitee to be indemnified pursuant to express contractual provisions. It is readily apparent that the LOIA is in direct conflict with this "federal common law" case and therefore cannot apply to supplement federal law

on fixed platforms located on the OCS. The Fifth Circuit itself has interpreted and upheld indemnity contracts based on federal law. *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge*, 424 F.2d 684 (5th Cir.), cert. denied, 400 U.S. 832 (1970).

The ruling of the United States Court of Appeals for the Fifth Circuit also creates a schism with the decisions in other circuits. *See, Beloit Power Systems Inc. v. Hess Oil Virgin Islands Corp.*, 757 F.2d 1427 (3rd Cir.1985); *Eastern Airlines, Inc. v. Insurance Co. of North America*, 758 F.2d 132 (3rd Cir. 1985) in which the United States Court of Appeals for the Third Circuit interpreted contracts according to federal common law and upheld indemnity provisions.

## III.

## APPLICATION OF LOIA TO THE OCS WOULD BE AN IMPROPER EXTENSION OF STATE POLICE POWER TO IMPAIR CONTRACTS INTO AN AREA OF EXCLUSIVE FEDERAL JURISDICTION.

The extension of the LOIA to fixed platforms on the OCS is a dangerous precedent which warrants review by this Court. The United States Court of Appeals for the Fifth Circuit in *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir.),reh'g denied, 788 F.2d 250 (5th Cir. 1986), assumed in reaching its decision that federal law is silent as to the validity of indemnity agreements, and that this silence created a gap to be filled by state law. The silence is deafening. Simply because Congress has not acted to expressly approve indemnity agreements *per se* does not mean that

it intended that state law should be used to supplant established federal policy and practice in this area.

The freedom of an individual to contract is considered such a basic right of a citizen of the United States that it is protected by the United States Constitution: "No State shall ... pass any ... law imparing the obligation of contracts ...." U.S. CONST. art. I, § 10, cl. 1. Hence no state can pass a law imparing a contract unless it is a valid exercise of that state's police power to insure the health, safety or welfare of its citizens. However, the OCS and any fixed platforms located thereon are considered federal enclaves and within an area of exclusive federal jurisdiction. *See, Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969). Accordingly, impairment of an individual's right to contract with respect to activities taking place on the OCS would require an exercise of congressional authority rather than state police power. Congress has never seen fit to exercise that power to invalidate indemnity agreements. Congress' silence does not create a lacuna in the law but rather leaves intact an individual's constitutional right to contract, including the option to pre-apportion risk through indemnity agreements. The application of the LOIA to the OCS would thus be an illogical and unfounded extension of state police power into an area of exclusive federal jurisdiction in which Congress has not seen a need to exercise its authority.

In *Energy Reserves v. Kansas Power and Light*, 459 U.S. 400 (1983), this Court upheld a state's use of its police power in regulating the price of *intrastate* natural gas even though it may have impaired the obligations of contracts. However, the Court also noted that it had struck down the state's earlier attempt to set a wellhead price because

the price regulation extended to gas in *interstate* commerce — an area of exclusive federal jurisdiction. *Id.* at 413 (n. 17). This amply demonstrates that a state's exercise of its police power, even though valid within its jurisdiction, will not be extended to an area of exclusive federal regulation such as interstate gas, and in this case should likewise not be extended to the OCS.

## IV.

## APPLICATION OF LOIA TO THE OCS IMPOSES AN UNDUE BURDEN ON INTERSTATE COMMERCE AND VIOLATES THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The Commerce Clause of the Constitution of the United States provides: "Congress shall have power to ... regulate Commerce ... among the several states." U.S. CONST. art. I, § 8, cl. 3. Application of LOIA to fixed platforms on the OCS will impose an impermissible burden upon interstate commerce in violation of the Commerce Clause by rearranging pre-apportioned financial obligations of Companies engaged in interstate commerce. In *Morgan v. Virginia*, 328 U.S. 373 (1946), this Court invalidated a statute requiring the segregation of bus passengers as being an undue burden on interstate commerce. In reaching this decision the Court held that, "[i]t is equally well settled that, even where Congress has not acted, state legislation ... is invalid which materially affects interstate commerce." *Id.* at 379. In this case the Court found that, "[a] burden may arise from a state statute which requires interstate passengers to order their movements on the vehicle in accordance with local rather than National requirements." *Id.* at 380-81. The Court also

held that the imposition of such a burden cannot be justified as an exercise of the state's police power.

If the inconvenience of having to rearrange seating during an interstate trip was accorded enough significance in interstate commerce so as to warrant protection from any undue burdens imposed by a state, even where there is *no* federal regulation, then the parties, activities and contracts involved in producing hydrocarbons from the OCS should be granted the same relief. As opposed to being an area where there is no federal regulation, this is a highly federally regulated area due in large part to its national importance and interstate nature. In fact, Congress has defined natural gas which is produced from the OCS as being committed or dedicated to interstate commerce under the terms of the NGPA. 15 U.S.C. § 3301 (18)(A)(i) (1983). As noted in *Energy Reserves v. Kansas Power and Light*, 459 U.S. 400 (1983), such attempts to regulate interstate gas have already been rejected. To subject such an important national interest to the vagaries of various state statutes would impose great burdens on interstate commerce, *directly* impact financial obligations of interstate businesses and disrupt the uniform development of a vital national resource. This is particularly true where the state itself is not attempting to apply its police power to the OCS but rather that power is being judicially extended as surrogate federal law to fill a supposed gap.

## CONCLUSION

The application of the LOIA to fixed platforms on the OCS is preempted by an exhaustive body of federal regulation covering exploration for and development of subsea mineral resources. LOIA is also contradictory to a

body of federal common law permitting parties to enter into contracts which pre-apportion financial responsibilities and risks through indemnity provisions. LOIA does not fall within the rubric of 43 U.S.C. § 1333(a)(2)(A) (1983) since it is neither applicable nor consistent with the relevant federal law. If anything, application of LOIA to the OCS would be tantamount to an impermissible restriction imposed by a state on the orderly uniform development of important national resources within an area of exclusive federal jurisdiction.

LOIA cannot be applied to the OCS since it would be an unconstitutional extension of a state's use of its police power to impair contracts into an area of exclusive federal jurisdiction and would violate the Contract Clause and Commerce Clause of the Constitution of the United States. Gulf Oil Corporation's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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## CERTIFICATE

I hereby certify that a copy of the above and foregoing has been mailed by U. S. Mail to all counsel of record, and to the Attorney General for the State of Louisiana this 19th day of September, 1986, New Orleans, Louisiana.

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(5)

Supreme Court, U.S.
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CLERK

NO. 86-74

# In the Supreme Court of the United States

OCTOBER TERM, 1986

GULF OIL CORPORATION

Petitioner

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## AMICUS CURIAE BRIEF OF EXXON CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF GULF OIL CORPORATION

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## INTEREST OF AMICUS CURIAE EXXON CORPORATION

Gulf Oil Corporation (Gulf) has filed a Petition for Writ of Certiorari in the instant matter seeking review of questions arising out of the application of the Louisiana Oilfield Indemnity Act (LOIA) La.Rev.Stat.Ann. §9:2780 (West 1985), to contracts for services to be performed on the Outer Continental Shelf (OCS). Exxon Corporation (Exxon) contracts with an extensive number of oilfield contractors for the performance of services in connection with the exploration for and production of oil and gas on the OCS. Thus, Exxon is substantially affected by the LOIA.

During its 1981 Session, the Louisiana Legislature pased Act 427, which added to the Louisiana Revised Statutes a section rendering invalid certain indemnity agreements relating to the development, exploration and production of minerals. Having erroneously perceived that "an inequity is foisted on certain contractors and their employees" by indemnity agreements pertaining to the drilling for oil, gas, water, or minerals, the Legislature declared null and void and as against public policy any agreement requiring defense or indemnification for loss or liability for damages from death or bodily injury to persons caused by the sole or concurrent negligence or fault (strict liability) of the indemnitee. La.Rev.Stat.Ann.§9:2780 (A),(B).

The term "agreement" as defined by subsection C of the LOIA is very broad, covering any written or oral agreement or understanding concerning exploration, development, production, and/or services or any agreement collateral thereto. Thus, the LOIA prohibits agreements

which require waivers of subrogation, additional named insured endorsements, or any other form of insurance protection not specifically authorized by the statute. A traditional business practice in the offshore oil industry has been for oilfield operators and their service contractors to negotiate and agree upon the apportionment of liability for negligence. This has commonly been accomplished by the use of an indemnity agreement in the master service contract. A standard provision of some service contracts requires the service company to provide proof of insurance containing a contractual liability endorsement and a waiver of rights of subrogation, or to name the oil company as an additional insured on the contractor's liability policies. The LOIA, in effect, prohibits the voluntary apportionment of risk between private parties. The Act applies to master service contracts which number in the hundreds, if not thousands, to be performed within the State of Louisiana, as well as in the Gulf of Mexico, where the LOIA has been principally applied, to the economic detriment of oilfield operators, including Exxon.

## SUMMARY OF ARGUMENT

Exxon supports the position of and arguments set forth by Gulf which urge that:

1. The LOIA is inconsistent with federal law and, as such, cannot be adopted as surrogate federal law governing operations on the OCS pursuant to the provisions of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.A. §§1331-1356;

2. By enacting the OCSLA, Congress intended to preclude the states from attempting to control or regulate the development of minerals on the federal enclave; and

3. The LOIA is unconstitutional in that it violates the Contract Clause of the United States Constitution.

## ARGUMENT

### I. THE LOIA IS INCONSISTENT WITH APPLICABLE FEDERAL LAW AND THEREFORE CONNOT BE ADOPTED AS SURROGATE FEDERAL LAW GOVERNING OPERATIONS ON THE OCS.

The Constitution and laws of the United States extend to OCS land and artificial islands and installations attached thereto. 43 U.S.C.A. §1333(a)(1). The laws of the adjacent states are declared to be the laws of the United States, for purposes of the OCSLA, to the extent that they are applicable and not inconsistent with this sub-chapter or other federal laws. 43 U.S.C.A. §1333(a)(2)(A). Within the same section, in §1333(b), Congress incorporates the provisions of the Longshoremen's & Harbor Worker's Compensation Act (LHWCA), 33 U.S.C.A. §§901 - 950, with respect to disability or death of an employee resulting from any injury occurring as a result of operations conducted on the OCS.

The LHWCA, as amended in 1984, contains provisions which permit reciprocal contractual indemnity between a vessel owner and the employer of an injured OCS worker. 33 U.S.C.A. §905(c). As noted by Gulf in its Petition for Writ of Certiorari at p. 18, Congress intended this provision to govern indemnity agreements on the OCS and preclude contrary state regulation. This Court has recognized in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), that according to the exclusive liability provision of the Federal Employees Compensation Act, 5 U.S.C §8116(c), which is analogous to §905(a) of the

LHWCA, a third party claim for contractual indemnity may be asserted against an employer.

Exxon submits that the LHWCA was intended to preempt the entire field of maritime worker's compensation and that its incorporation as part of the OCSLA does not in any way diminish the pervasiveness or comprehensiveness of its coverage. When Congres enacts constitutionally valid legislation addressing a particular subject matter of legitimate Federal concern, the states are precluded from enacting or enforcing statutes attempting to regulate the same subject matter by virtue of the Supremacy Clause. U. S. Const. Art. VI cl. 2. The intent to regulate a particular field is found where the statutory language or legislative history of an Act of Congress evidences a pervasive and comprehensive plan of federal regulation; where the legislation under review affects an area imbued with a dominant federal interest; or where the object and character of the congressional enactment reveal a purpose to occupy the field. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The dominance of the federal interest expressed in the LHWCA acts to circumscribe any power on the part of the states to enact laws attempting to regulate the same matters, even if the state law is intended to complement or supplement the federal scheme. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941). The congressional purpose to preclude state legislation in areas covered by the LHWCA may be inferred from the completeness of the federal legislation. When the scheme of federal regulation is complete and pervasive, it is reasonable to infer that Congress left no room for the states to supplement it.[1]

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[1] *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919); *Coverleaf Butter Co. v. Patterson*, 315 U.S. 148, 156 (1942).

Indeed, application of state laws purporting to address the matter of indemnification provisions in service contracts can only lead to irresolvable conflicts, confusion, and needless litigation. This has been the case with respect to the LOIA in which the Louisiana Legislature, with one stroke of the pen, enacted legislation which not only deprives private parties of substantive contractual rights, but attempts to circumvent application of federal law on the OCS.

Because such conflicts exist between federal and state law dealing with the same subject, the state law must yield to federal preemption.[2] We submit that there is no way to harmonize the LOIA with the comprehensive scheme of federal regulation mandated by Congress in the OCSLA and the provisions of the LHWCA, which have been held to permit not only contractual indemnity agreements, but also insurance related provisions collateral thereto. *Voisin v. ODECO Drilling Co.*, 744 F.2d 1174 (5th Cir. 1984), *cert. den., Rig Hammers, Inc. v. ODECO Drilling, Inc.*, 53 U.S.L.W. 3669 (1985).

## II. THE LOIA SUBSTANTIALLY FRUSTRATES NATIONAL POLICIES SOUGHT TO BE EFFECTUATED BY THE OCSLA AND SHOULD BE DECLARED INVALID UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

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[2] Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. This Court has held that a conflict will be found "...where compliance with both federal and state regulations is a physical impossibility..." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), *reh'g. denied*, 374 U.S. 858 (1963).

In enacting the OCSLA, Congress enunciated the policy that "[t]he OCS is a vital national resource reserve held by the Federal Government for the public, which should be made available for the expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs..." 43 U.S.C.A. 1332(3). It is recognized that the management of mineral exploration, developmant and production on the OCS is a matter of national interest. 43 U.S.C.A. 1332(4).

Although federal law was intended to govern all activities on the OCS, 43 U.S.C.A. §1333(a)(1), Louisiana has, by enacting the LOIA, attempted to participate in the regulation of such activities upon the OCS in a manner which is inconsonant with the strong national policy of establishing uniform federal regulation in this area.

Any state legislation which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "frustrates the full effectiveness of federal law" is invalid.[3] This is true regardless of whether Congress specifically intended to preempt the particular state statute. Furthermore, it is well settled that a finding of substantial frustration may be based on an interference not apparent on the face of a statute.[4] Thus, it is not necessary that the LOIA evidence a direct conflict

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[3] *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones v. Ruth Packing Co.*, 430 U.S. 519, 525-26 (1977), *reh'g. den.*, 431 U.S. 925 (1977), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Perez v. Campbell*, *402 U.S. 637, 652 (1971).*

[4] *See, e.g., Jones v. Ruth Packing Co.*, 430 U.S. 519, 540-43 (1977); *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239 (1967); *Hill v. Florida*, 325 U.S. 538 (1945).

with any provision of the OCSLA. Rather the statute can and should be invalidated because it substantially frustrates the purpose of uniformity and efficient development of resources on the OCS. Such an intrusion in an area where federal law must be "the supreme law of the land" cannot be countenanced on the basis of state police power particularly within a geographic location beyond the borders of the state.

## III. THE LOIA WORKS A SUBSTANTIAL IMPAIRMENT OF THE OBLIGATION OF CONTRACTS IN A MANNER VIOLATIVE OF ARTICLE 1, §10, OF THE UNITED STATES CONSTITUTION.

The blanket contract in the case at bar was executed on May 16, 1980, and specified effective dates "through May 16, 1972, and as long thereafter as necessity for same continues." Therefore, the work covered by the contract included jobs commenced both before and after the effective date of the LOIA, September 11, 1981.

Section I of the Act provides that its application specifically includes what is commonly referred to in the oil industry as master or general services agreements or blanket contracts in whatever form and by whatever name. The Act shall not apply to a contract which was executed before the effective date of this Act and which contract governs a specific terminable performance of a specific job or activity listed in Subsection C.

It has been held that under Louisiana law, a contract is executed when all of the acts necessary to render it a binding obligation are completed. *Page v. Gulf Oil Corporation,* 775 F.2d 1311 (5th Cir. 1985). Thus the *Page* court

held that the agreement became effective only upon Gulf's notice or request for services; in other words when Gulf requested, and its contractor responded by supplying service and equipment. The record in the instant matter does not indicate the effective date of the agreement under a *Page* analysis, but rather provides a holding that the Act applies to the instant agreement because it applies to work to be performed in the future. Exxon submits that the continued vitality of such a holding will permit the LOIA to be applied retroactively in a manner that is violative of the Contract Clause of the United States Constitution.

In Contract Clause analysis, the first inquiry is whether the State law has, in fact, operated a substantial impairment of a contractual relationship. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978), *reh'g. den.*, 439 U.S. 886 (1978). It is clear that the LOIA effects such an impairment. The LOIA nullifies all oilfield indemnity contracts, waivers of subrogation, additional named insured endorsements and any form of insurance protection. The LOIA prohibits private parties from allocating the risks of a venture and responsibility of the procurement of insurance.

When an agreement is reached requiring a contractor to provide insurance coverage, the acceptance of this obligation on the part of the contractor is reflected in the price paid by the oilfield operator. The contractor, in turn, pays a premium to the insurance company underwriting the risk and typically provides the oilfield operator with proof of insurance. The application of the LOIA to indemnity agreements and insurance contracts collateral thereto, can create a windfall for the insurance company. Such windfall would be at the expense of the oilfield operator

who may find itself either paying twice, or without any insurance at all. We submit that such obliteration of insurance related contractual provisions constitutes a substantial impairment of contract.

The contractual impairment occasioned by the LOIA does not further any important public purpose, and in any event is an unnecessary and unreasonable means even to a legitimate end. In considering whether a state's impairment of contractual obligations is constitutional, the height of the hurdle the state legislation must clear is determined by the degree of impairment. *Allied Structural Steel*, 438 U.S. 234, 245. Severe impairment, as in the case of the LOIA as applied to contracts for services upon the OCS, demands a careful examination of the nature and purpose of the state legislation. *Id.*

In determining whether the end sought to be achieved by a state legislature justifies the impairment of a contractual obligation, this Court has focused on two criteria: first, whether the legislation was enacted because of an "emergency"; and second, whether the legislation was "addressed to a legitimate end," that is, whether it was "for the mere advantage of particular individuals or for the protection of a basic interest of society." *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 444-45 (1934); *Allied Structural Steel*, 438 U.S. 234, 242.

The LOIA does not purport to be enacted in response to any emergency situation. No such finding was or could have been made by the Louisiana legislature in its promulgation of this Act. Nor does the LOIA address a legitimate end or further an important general societal

interest. While the drafters of the Act purport to concern themselves with rectifying perceived inequities "foisted on" certain oilfield service contractors, the real beneficiary of the Act, as noted above, may well be the insurance company who has been paid a premium to underwrite the risk, but whose obligation has been nullified by the provisions of the LOIA.

Assuming *arguendo* that the legislature sought to achieve a legitimate end in enacting the LOIA, the constitutional inquiry is not at an end. The means adopted by the Louisiana Legislature in enacting the LOIA were not reasonable or necessary to serve an important public purpose.[5]

Lower courts, in scrutinizing the LOIA, have upheld it on the basis that it promotes safety in the oilfield. Beginning with *Bryant v. Platform Well Service, Inc.* 563 F.Supp. 760 (E.D.La. 1983), the purpose of the LOIA was acknowledged as being, in large part, to emphasize safety in the oil industry. As stated by the Fifth Circuit in *Knapp v. Chevron,* 781 F.2d 1123 (5th Cir. 1986),

> If a person is permitted to insulate himself from his own negligence, the motivation to institute and enforce safe work practices and conditions is at best attenuated. One who remains liable and exposed for his own negligence is more likely to act with care. The Act is a rational attempt to improve oilfield safety. (Citations omitted) 781 F.2d 1123, 1130.

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[5] Legislation modifying contractual rights and obligations must use means that are (1) "necesary" to serve the "important public purpose" and, (2) "reasonable" in their terms and conditions. *United States Trust Company v. New Jersey,* 431 U.S. 1, 25, *reh'g. den.,* 431 U.S. 975 (1977).

Exxon submits that to permit the contractor/indemnitor to escape liability for *its own fault* as much violates this purpose as to allow the indemnitee to do the same. The LOIA is now being construed to go much farther than simply rendering the oil company/indemnitee accountable for its own fault. It is currently being invoked as a vehicle to totally insulate the contractor/indemnitor from any liability *for its own* fault.[6] This is an absurd result to be reached under a statute arguably designed to enhance safety.[7]

Governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by a mere assertion in the preamble of a law. When it is shown that state action threatens signigicantly to impair constitutionally protected freedom, judicial inquiry must be made to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose aserted as its justification. *Bates v. City of Little Rock,* 361 U.S. 516

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[6] Because the contractor/employer is fully immune from direct tort liability by virtue of the provisions of the LHWCA, the plaintiff would not assert his employer's negligence in his tort claim, even if it was the actual cause of the injury. See e.g., *Meloy v. Conoco, Inc.,* 784 F.2d 1320 (5th Cir. 1986); *petition for rehearing granted and questions certified to La. Supreme Court,* (5th Cir. July 18, 1986) (No. 84-4718); *Durant v. Chevron, U.S.A., Inc.,* 613 F.Supp. 1189 (E.D. La. 1985); *Moser v. Aminoil U.S.A. Inc.,* 618 F.Supp. 774 (W.D. La. 1985); *Aucoin v. Pelham Marine, Inc.,* 593 F.Supp. 770 (W.D. La. 1985).

[7] As a practical matter, the contractor is generally in the best position to prevent job-related accidents because of the control it retains over its own particular operations. The contractor is being paid to be on location and to actually supervise the activities of the OCS worker. A very limited number of oil company representatives, on the other hand, are present to coordinate the efforts of various crews of contract employees, but are not in a position to involve themselves in the actual accomplishment of the specialty work which has been contracted out.

(1960). Exxon submits that the LOIA does not meet this constitutional standard.

## CONCLUSION

Exxon supports the Petition for Writ of Certiorari of Gulf in this cause. Although we have concentrated our arguments in the areas of preemption, frustration of federal policies, and impairment of contracts, we do not wish to minimize the importance of other substantial federal and constitutional questions presented by Gulf.

For the foregoing reasons, as well as those expressed by Petitioner Gulf, Exxon respectfully requests this Court to grant the Writ of Certiorari sought by Gulf Oil Corporation in this cause.

Respectfully Submitted,
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